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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1992

JOHN D. ELLIOTT and C. LEONARD DAVIS,

Petitioners,

v.

THE CITY OF ATHENS, GEORGIA,
and the MAYOR AND COUNCIL
OF THE CITY OF ATHENS, GEORGIA,
DWAIN P. CHAMBERS, MIRIAM MOORE, HARRY SIMS,
CARDEE KILPATRICK, KATHY HOARD, LINNY BAILEY,
MAC COILE, CAROLYN REYNOLDS, GWEN O'LOONEY
and CALVIN BRIDGES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a municipal zoning ordinance which limits the number of unrelated persons who may live together in a single-family dwelling; which contains no such limitation for related persons; which does not apply to all occupants; and which does not restrict the maximum number of occupants in a dwelling is a "reasonable occupancy limitation" within the meaning of 42 U.S.C. § 3607(b)(1).

2. Whether a municipal zoning ordinance which limits the number of unrelated persons who may live together in a single-family dwelling, without providing or accommodating for the needs of handicapped persons to reside in a group living environment, is a "reasonable occupancy limitation" within the meaning of 42 U.S.C. § 3607(b)(1)?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

REPORTS OF OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 14

I. THE COURT OF APPEALS' ERRED IN HOLDING THAT THE CITY IS EXEMPT FROM THE FAIR HOUSING ACT BECAUSE THE ATHENS ZONING ORDINANCE DOES NOT CONTAIN A REASONABLE OCCUPANCY LIMITATION PERMITTED BY 42 U.S.C. § 3607(b)(1). 14

A. The Athens Ordinance is not a Maximum Occupancy Limitation. 16

B. The Athens Ordinance is Unreasonable as Applied to Handicapped Persons. 19

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERRORS OF THE COURT OF APPEALS TO PREVENT THE EXCLUSION OF HANDICAPPED PERSONS FROM RESIDENTIAL AREAS THROUGHOUT THE NATION 25

CONCLUSION 31

APPENDIX 1
Opinion of the 11th Circuit Court of Appeals,
Dated May 19, 1992 . . . . . A1-1

APPENDIX 2
Opinion of the U.S. District Court, N.D., Ga.,
Dated January 23, 1991 . . . . . A2-1

TABLE OF AUTHORITIES

CASES

Doe v. City of Butler, Pa., 892 F.2d 315 (3d Cir. 1989) 17, 23

Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir. 1992) 16, 17, 19, 25, 28

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) 22, 23

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) 17

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) 29, 30

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 3601 1

42 U.S.C. § 3602(h) 6

42 U.S.C. § 3602(i) 4

42 U.S.C. § 3604(f)(3) 2

42 U.S.C. § 3604(f)(9) 6

42 U.S.C. § 3607(b)(1) . . . . . i, 2, 14, 18, 19

Athens, Ga., Code § 9-1-4 (1987) 2, 9

Athens, Ga., Code § 9-1-143 (1987) 8

Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988), 42 U.S.C. § 3601, *et seq.* 3, 20-26, 29, 30

LEGISLATIVE HISTORY

H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173 . . . . . 15, 17-19, 25, 27

REPORTS OF OPINIONS BELOW

The May 19, 1992 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 960 F.2d 975 and is reprinted in the Appendix to this Petition at A1-1. The prior opinion of the United States District Court for the Middle District of Georgia, also reprinted in the Appendix at A2-1, is not officially reported in the Federal Supplement.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered May 19, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the 1988 amendments to the Fair Housing Act, 42 U.S.C. § 3601, *et. seq.*, specifically:

42 U.S.C. § 3607(b)(1), which provides:

> Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

and 42 U.S.C. § 3604(f)(3), which provides:

> For the purposes of this subsection, discrimination includes--
>
> > (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

Also at issue in this case is the Zoning Ordinance of the City of Athens, Georgia, specifically that provision (Athens, Ga., Code § 9-1-4 (1987)) which defines a "family" as:

> One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a related family may have up to two (2)

unrelated individuals living with them. The term "family" does not include any organization or institutional group.

STATEMENT OF THE CASE

As a matter of first impression before this Court, this case presents a challenge to a local zoning ordinance pursuant to the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988), 42 U.S.C. § 3601, *et seq.* (hereinafter the "FHAA" or the "Act"). The FHAA added "handicapped persons" to the classes of individuals protected by Title VIII of the Civil Rights Act of 1968 against discriminatory housing practices.

At issue in this case is whether a local government may frustrate the purposes of the Fair Housing Amendments Act by promulgating a definition of "family" which, in material part, restricts the group or number of persons who may occupy a single dwelling unit to either

a group of related persons of unlimited number or to a number of unrelated persons not greater than four.

Petitioners, John D. Elliott and C. Leonard Davis, are residents of the City of Athens, Georgia and are the owners of property located at 490-490½ Ruth Street in Athens, Georgia. The Ruth Street property is a single lot, improved with two detached houses, each of which contains a separate, independent housekeeping establishment. Messrs. Elliott and Davis are not handicapped individuals, but the parties stipulated their standing to bring this action as "aggrieved parties" as defined in 42 U.S.C. § 3602(i).

On or about March 28, 1989, Messrs. Elliott and Davis entered into a contract with the Atlanta Union Mission for the sale of the Ruth Street property, contingent upon obtaining from zoning officials approval to use the property according to the needs of The Potter's House. The Potter's House is the rehabilitation division

of the Atlanta Union Mission, a non-profit corporation based in Atlanta, Georgia.

The Potter's House operates an alcohol and drug rehabilitation center for men at its farm facility in Jefferson, Georgia. The program is a work and counseling program based upon the principles of Alcoholics Anonymous and the Christian faith. As part of the Potter's House work program, the men are employed in either one of the four stores operated by the Potter's House or in some part of the farm operation. The Reverend Jack Lindsay, director of The Potter's House, sought to purchase the Ruth Street property for use as a group-residence home ("half-way house") for men who had finished the program at the farm, who were ready to go back into society, but who needed the structure and support of a group home before being left totally on their own.

The parties stipulated during trial that the persons who would reside in the home are "handicapped" within

the meaning of 42 U.S.C. § 3602(h) and are not a threat to the community as described in 42 U.S.C. § 3604(f)(9).

As envisioned by Rev. Lindsay, the proposed group home would provide housing for twelve program participants and at least one staff member. The residents of the home would live together as a single housekeeping unit. They would eat, pray, do household chores, and participate in the recovery program together on a daily basis. All of the residents of the home would be employed and there would be house rules prohibiting the use of alcohol, overnight female visitation and other activities inconsistent with the rehabilitative purposes of the program. The Potter's House would provide residents of the home with all of their needs including food, clothing, shelter and supervision. In turn, each resident would be charged $75.00 per week. This figure was determined by Rev. Lindsay based upon what he found to be the going rate in similar Atlanta-area programs operated for profit, his assumption that most of the resi-

dents would be working minimum-wage jobs and his desire to provide a "bargain" for the residents. Rev. Lindsay did not intend for the program to be a profit-making venture and anticipated that either The Potter's House or local church groups would be called upon to supplement the finances of the home from time to time.

Upon request of Petitioners, the planning department of Athens/Clarke County reviewed the proposed use of the property and advised that such use was prohibited because the number of residents exceeded the restrictions for the number of unrelated persons allowed by the zoning ordinance.

The zoning ordinance of the City of Athens divides the City into various zoning districts and defines for each district the permitted and conditionally permitted uses within such district. There are, within the City of Athens, three types of single-family residential districts, two types of general residential districts, two types of multi-family

residential districts, and various types of commercial, industrial, and governmental districts.

The Ruth Street property is currently zoned RS-10, which is, pursuant to the zoning ordinance, a single-family zoning designation. Permitted uses in an RS-10 zone are:

a. Single-family;
b. Parks and recreational areas publicly owned and operated;
c. Horticulture activities and the raising of farm animals, including horses, for non-commercial purposes;
d. Governmental buildings - federal, state and local;
e. Subdivision recreational areas owned, operated, and maintained by homeowners' associations exclusively for the use of residents and their guests;
f. Family day care homes; and
g. Accessory uses as defined elsewhere in the zoning ordinance.

Athens, Ga., Code § 9-1-143 (1987).

The numbers and relationships of people who are permitted under the zoning ordinance to live in a single-family dwelling are limited by the definition of the term

"family" as found in the zoning ordinance. A "family" is defined as:

> One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a related family may have up to two (2) unrelated individuals living with them. The term "family" does not include any organization or institutional group.

Athens, Ga., Code § 9-1-4 (1987).

Pursuant to this definition of family, the number of related persons who can live together, and in certain combinations with unrelated persons in any dwelling in the City of Athens is unlimited. In its definition of "family," the zoning ordinance makes no distinction between handicapped and non-handicapped individuals, but, among unrelated persons, residential occupancy is restricted only by numbers.

The RS-10 district permits one single-family structure per lot, but because the two structures were located on the Ruth Street lot prior to the adoption of the ordinance, a grandfather clause allows the two single-family dwellings to remain. As a result, two "families," as defined by the zoning ordinance, are permitted to reside on the Ruth Street property.

The City adopted its definition of "family," restricting the number of unrelated persons who could live together, in order to regulate and protect single-family neighborhoods from the negative effects of the student population in Athens, specifically overcrowding, traffic and noise. The City used Census Bureau figures for average household size in determining the number of unrelated persons who could constitute a "family".

When the City reviewed the Potter's House plan for a "half-way house," the planning department advised Petitioners that the proposed use would be considered, under a "similar use" provision, to be a boarding house.

A boarding house for 12 residents plus staff is not permitted in any single-family residential or general residential zone in the City of Athens, but would be permitted in either of the multi-family residential zones and in some of the commercial zones.

Although Petitioners did not believe that the proposed use of the home should be likened to a boarding house, Petitioners attempted to have their property rezoned for a multi-family use so as to permit a sufficient number of people to live on the property for the operation of the group home. Petitioners applied to have the property rezoned to RM-2, a multi-family designation, which would permit a boarding house.

As part of the rezoning process in the City of Athens, members of the planning department staff study the proposed change and its impact on various factors in the neighborhood and demands upon municipal services. In their study of this rezoning application, the planning department and other City officials determined

that the proposed group home would not burden the adequate provision of municipal services such as transportation, water and sewage. Further, because of the nature of the Potter's House program (all residents would be adult males and employed or seeking employment), it is reasonable to infer that other public facilities, such as schools and parks, would not be adversely impacted by the establishment of the group home. Despite the absence of negative impact upon the provision of municipal services and the utilization of public facilities, the planning department staff recommended denial of the application. The stated reasons for the recommended denial were that rezoning the property to multi-family would set a negative precedent for the neighborhood's future and it would constitute spot zoning. Petitioners' rezoning application was denied.

After the denial of the rezoning application, Petitioners requested that the City either issue an interpretation of the zoning ordinance to specifically permit

group homes for handicapped persons in single-family residential neighborhoods or amend the zoning ordinance to permit such a use. When the City failed to grant any relief, Petitioners instituted this suit.

Petitioners filed this case in the United States District Court for the Middle District of Georgia, seeking declaratory and injunctive relief against the City of Athens, Georgia. Specifically, Petitioners alleged that handicapped persons were denied the opportunity to reside within single-family residential neighborhoods in the City of Athens, Georgia, in violation of the Fair Housing Amendments Act, by the City's refusal to make reasonable accommodations in its rules, policies, practices, or services, as necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' ERRED IN HOLDING THAT THE CITY IS EXEMPT FROM THE FAIR HOUSING ACT BECAUSE THE ATHENS ZONING ORDINANCE DOES NOT CONTAIN A REASONABLE OCCUPANCY LIMITATION PERMITTED BY 42 U.S.C. § 3607(b)(1).

The central issue in this case is the application of 42 U.S.C. § 3607(b)(1) which provides: "Nothing in this subchapter limits the applicability of any **reasonable** local, State, or Federal restrictions regarding the **maximum number of occupants** permitted to occupy a dwelling." (Emphasis added.) The Court of Appeals' holding that the City is exempt from the Fair Housing Act is error because the occupancy limitation of the Athens zoning ordinance does not limit the maximum number of persons permitted to occupy a dwelling, nor is it reasonable.

The published legislative history regarding this exemption shows that Congress intended the statute to

permit only non-discriminatory limitations which apply to all occupants:

> These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to **all occupants** , and **did not operate to discriminate** on the basis of race, color, religion, sex, national origin, handicap or familial status.

H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2192 [hereinafter "House Report"] (emphasis added).

The City's exclusion of handicapped persons, requiring a group living environment, from single-family residential areas was held by the majority opinion below to be exempt from Fair Housing Act scrutiny as a "reasonable occupancy limitation" because: 1) It is

constitutionally permissible to limit the number of unrelated persons who may reside together in a dwelling but impermissible to similarly limit the number of related persons; and 2) The limitation on unrelated persons is rationally related to legitimate interests of the City and the City's interest in maintaining the character of single-family residential areas outweighs the interests of handicapped persons to live in a group setting within such residential areas. *Elliott v. City of Athens, Ga.*, 960 F.2d 975, 979-84 (11th Cir. 1992).

A. The Athens Ordinance is not a Maximum Occupancy Limitation.

Despite the clear, unambiguous language of both 42 U.S.C. § 3607(b)(1) and its legislative history, the Court of Appeals held that the statutory exemption was not intended to permit occupancy limitations on related persons and, thus, a zoning ordinance placing limits only on unrelated persons qualifies for the statutory exemp-

tion. *Id.* at 979-81. The Court premised its holding upon its interpretation of *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) and supporting dictum in *Doe v. City of Butler, Pa.*, 892 F.2d 315 (3d Cir. 1989), that any occupancy limitation on related persons is unconstitutional. *Elliott v. Athens* at 979-81. The Court reasoned that to "save" the statute, the statute must be interpreted to apply only to constitutionally permissible occupancy limitations upon unrelated persons. *Id.*

The Court of Appeals found that Congress was "merely giving examples," when describing some of the maximum occupancy limitations Congress contemplated would fall within the statutory exemption, *id.* at 980, and failed to recognize that these examples were precisely the type of occupancy limitation which the statute was designed to permit. There is no support for the proposition that a limitation on only unrelated persons was even remotely considered. In fact, the House Report shows

that Congress intended the amendments to 42 U.S.C. § 3607(b)(1) "to make additional exemptions **relating to the familial status provisions.** " House Report at 31, 1988 U.S.C.C.N. at 2192 (1988) (emphasis added). Clearly, the statute was intended to permit the type of occupancy regulation upon families, designed to prevent overcrowding, which the Department of Housing and Urban Development has implemented for property it owns and funds.[1]

As argued by the dissent below[2], if a reasonable occupancy limitation can not be applied to related persons, then the statute can not be "saved." As the language of the statute and its legislative history clearly express the intent of Congress to exempt only occupancy limitations which apply "equally to all occupants," this Court:

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[1] *See* 54 Fed. Reg. No. 13 at 3237 (Jan. 23, 1989).

[2] *See Elliott v. City of Athens, Ga.*, 960 F.2d 975, 986, fn. 1 (11th Cir. 1992) (Kravitch, C.J., dissenting).

> . . . should not ignore this clear statement of Congressional intent and squeeze the Athens ordinance into an exemption from which it is so obviously excluded, even if effectuating Congressional intent *may* mean rendering the exemption useless.

Elliott v. Athens, supra, at 986 (Kravitch, C.J., dissenting).

B. <u>The Athens Ordinance is Unreasonable as Applied to Handicapped Persons.</u>

Pursuant to 42 U.S.C. § 3607(b)(1), an occupancy limitation must be *reasonable*. As shown by the legislative history, Congress intended "*reasonable*," in this context, to mean that the limitation "[does] not operate to discriminate on the basis of . . . handicap." House Report at 31; 1988 U.S.C.C.A.N. at 2192 (1988) (emphasis added).

In determining that the Athens Ordinance is a reasonable occupancy limitation, the Court of Appeals employed a balancing test. The Court weighed the City's interest in maintaining and protecting its single-

family residential neighborhoods from the detrimental effects of an uncontrolled student population against the interests of handicapped persons desiring to live in a group home setting within a single-family residential neighborhood. Accepting the City's argument that the limitation upon unrelated persons is necessary and the only practical way to control the student population, and without considering that handicapped persons are entitled to preferential treatment while students are not, the Court erroneously concluded that the City's legitimate interest in protecting its family neighborhoods far outweighed the interest of handicapped persons to live in single-family residential neighborhoods.

In applying this balancing test, the Court of Appeals, in error refused to apply the handicap-specific provisions of the FHAA relating to reasonable accommodation. Petitioners' argument on this point can not be expressed in language more clear or eloquent than that

used by Judge Kravitch in dissenting from the majority opinion:

> The majority seeks to prove the reasonableness of the ordinance by balancing the interests of the handicapped in access to housing against the municipality's interests in maintaining the residential character of a particular neighborhood. In an attempt to measure the harm to the handicapped population, the majority engages in a discussion of the "discriminatory impact" of the ordinance. Rather than recognize the *specific definition of discrimination contained in the FHAA,* the majority uses a disparate impact analysis that not only ignores the mandate of the statute, but is inappropriate in the context of evaluating *discriminatory* impact on handicapped persons.
>
> Section 3604(f)(3) of the FHAA states that:
>
> > For the purposes of this subsection, discrimination includes--
> >
> > (B) **a refusal to make reasonable accommodations** in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

(emphasis added). The statute explicitly equates discrimination with a failure to make reasonable accommodations and nowhere implies that a disparate impact analysis is appropriate. Indeed, a disparate impact analysis is particularly inappropriate in the situation of handicapped individuals. Such an analysis should be undertaken in situations in which groups that are entitled to equal treatment are not being treated as equals, not when a protected group is entitled to special treatment. Because handicapped people are entitled by law to preferential treatment and because preferential treatment is necessary to afford them equal access to housing, a disparate impact analysis is useless in this context and in fact negates the entire intent of including handicapped people within the FHAA.

In its opinion, the majority fails to mention the definition of discrimination set forth in the statute. Instead, it opines that a) "(t)here was no attempt to establish that the ordinance had a harsher effect on handicapped persons wanting to live in group homes than on college students or other non-handicapped persons desiring to live in group homes," and that b) in any case, the evidence of disparate impact is "extremely weak."

The majority's disparate impact language appears to stem from the district court's order which relied on *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (7th Cir.

1977). *Metropolitan* holds that the only way to prove a Fair Housing Act violation is by 1) a showing of discriminatory intent towards the protected class, or 2) proving disparate impact upon the protected class. *Metropolitan*, a racial discrimination case under the old FHA, was decided well before the amendments to the Act which added protection for handicapped people. The *Metropolitan* standard is superseded by the FHAA, which specifically defines a violation with respect to handicapped claimants.

Doe, which the majority relies upon to bolster its analysis, similarly is inapplicable to this case because it involved an allegation of discrimination on the basis of sex. In *Doe*, plaintiffs challenged, as sexually discriminatory, a local zoning ordinance that limited the number of unrelated occupants to six and consequently excluded a battered woman's shelter from the area. The court upheld the ordinance reasoning that there was no greater impact on these *women* than on a group of recovering *male* alcoholics seeking to establish a group home in the same neighborhood. *Id.* at 323. Reliance on *Doe* is as misplaced as reliance on *Metropolitan*; both these cases involve complaints of inequitable treatment by groups who are entitled to be treated as equals. In the case at hand, the potential occupants of the house are requesting inequitable treatment, treatment to which they are entitled by operation of the FHAA.

It is irrelevant, therefore, that the appellants may have failed to prove disparate impact. To establish a violation of the FHAA, they are only required to prove discrimination, i.e., a failure of the city to make reasonable accommodations that may be necessary to allow them equal access to housing. Section 3604(f)(3).[3]

. . .

The majority weighs the "weak evidence" of disparate impact on the handicapped men against the governmental interest in controlling density, traffic, and noise in its single--family residential districts. Even if the standard required such a balancing of interests,[4] the ordinance would still violate the FHAA. It is the governmental interest here that is weak, as evidenced by the municipal planning department's determination that the proposed group home "would not burden the provision of municipal services such as transportation, water, and sewage." In comparison, the interest of the handicapped men is strong because they are being

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[3] The language of the statute is liberal. Reasonable accommodation is required if such concession may be necessary to a handicapped person's ability to use and enjoy a dwelling. Section 3604(f)(3).

[4] As mentioned above, the proper question is whether or not reasonable accommodations have been made, not what the relative impacts are.

> denied a statutorily defined right: the reasonable accommodation necessary to afford them equal opportunity to use and enjoy the particular dwelling.

Elliott v. Athens, 960 F.2d. 975, at 986-88 (Kravitch, C.J., dissenting).

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERRORS OF THE COURT OF APPEALS TO PREVENT THE EXCLUSION OF HANDICAPPED PERSONS FROM RESIDENTIAL AREAS THROUGHOUT THE NATION

The expressed purpose of Congress in adopting the FHAA was to end the exclusion of people with disabilities from the mainstream of American life. As stated in the House Report:

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of **a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.**

House Report at 18; 1988 U.S.C.C.A.N. at 2179 (1988) (emphasis added). In recognition of the fact that handi-

capped persons are denied housing opportunities through the enforcement of "traditional" zoning rules and regulations, Congress drafted the FHAA to require changes in traditional rules and regulations that have the effect of denying the handicapped the right to live in the dwelling of their choice in a community:

> While state and local governments have authority to protect safety and health, and to regulate use of land, the authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities.
>
> . . .
>
> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. **The Act is intended to prohibit the application of** special requirements through **land-use regulations** , restrictive covenants, and conditional or special use permits **that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.**

. . .

> A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling. [5]

In the face of Congress' clear intention to require changes in traditional rules and regulations which may preclude handicapped persons from living in "the residence of their choice in the community," and in "congregate living arrangements" where appropriate, the Court of Appeals held:

> the Fair Housing Act amendments do not require a local government to permit handicapped individuals to live wherever they desire. The Act provides only that handicapped individuals be given meaningful access to housing in a nondiscriminatory fashion. While it may be true that handicapped individuals have a greater need to

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[5] House Report, at 24-25; 1988 U.S.C.C.A.N. at 2185-86 (1988) (emphasis added).

> reside in group settings, the City of Athens has other zones that permit such access for handicapped and other individuals.

Elliott v. Athens, 960 F.2d at 982-83.[6] The Court found the City's zoning ordinance would permit a group home in multi-family residential districts and in the office, commercial and business areas, and therefore held the City had provided 'meaningful access for group homes for handicapped persons in its residential areas." *Id.* at 983.

Additionally, the Court of Appeals found, consistent with the City's evidence at trial, that limitations on the number of unrelated persons who are allowed to reside together in a dwelling are "commonplace in the zoning regulations of counties and municipalities." *Id.* Given the prevalence of zoning ordinances which limit the number of unrelated persons who may reside

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[6] The areas cited by the Court include the multi-family residential zones where most student housing and apartments are located and the office, commercial and business districts which are not designed for residential living.

together in single-family residential neighborhoods, and thus preclude group homes for handicapped persons from those areas, the Court of Appeals' decision in this case will necessarily result in the widespread exclusion of handicapped people from the mainstream of American life.

Petitioners submit that the handicapped, whose housing needs are different, should not be precluded from enjoying the benefits of a "quiet place where yards are wide, people few, and motor vehicles restricted," *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), merely because some regulation is necessary to protect families from student lifestyles. The essential purpose of the FHAA was to guarantee and protect the right of handicapped persons to live where and how they choose, according to their needs. Yet it is clear that an untold number of jurisdictions will now, based upon the lower Court's decision in this case, continue to exclude handicapped persons who

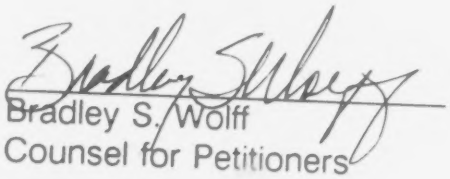
require group living arrangements from their residential districts or move to do so. Construing this Court's decision in *Belle Terre, supra*, with the Court of Appeals decision below, local governments throughout the nation now have a basis upon which to restrict **all** group homes from residential neighborhoods by lowering the occupancy threshold to two unrelated individuals and providing "meaningful access" to group homes in office, commercial and business districts. This foreseeable result would eviscerate the humane and worthy goals which Congress sought to assure with the passage of the FHAA and can only be prevented by a reversal from this Court.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted and, if granted, that the decision of the 11th Circuit Court of Appeals be reversed.

This 17th day of August, 1992.

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APPENDIX 1
Opinion of the 11th Circuit Court of Appeals,
Dated May 19, 1992

John D. Elliott, C. Leonard Davis,
Plaintiffs-Appellants,

The Atlanta Union Mission, d/b/a
The Potter's House, Plaintiff,

v.

The CITY OF ATHENS, GEORGIA, and
the Mayor and Council of the City of
Athens, Georgia, Dwain P. Chambers,
Miriam Moore, Harry Sims, Cardee Kilpatrick,
Kathy Hoard, Linny Bailey, Mac Coile,
Carolyn Reynolds, Gwen O'Looney and
Calvin Bridges, Defendants-Appellees.

No. 91-8147.

United States Court of Appeals,
Eleventh Circuit.

May 19, 1992.

Landowners brought action for declaratory and injunctive relief, challenging city zoning ordinance under Fair Housing Act after city denied approval for operation of group home for recovering alcoholics on landowners' property. The United States District Court for the Middle

District of Georgia, No. CA-89-89-ATH (DF), Duross Fitzpatrick, J., denied relief, and landowners appealed. The Court of Appeals, Anderson, Circuit Judge, held that Fair Housing Act exemption for ordinances setting maximum occupancy limits applied to city ordinance permitting maximum of four unrelated persons to occupy single residence.

Affirmed.

Kravitch, Circuit Judge, filed dissenting opinion.

Bradley S. Wolff, Arrington & Hollowell, P.C., Atlanta, Ga., for plaintiffs-appellants.

David K. Flynn, Irving Gornstein, U.S. Dept. of Justice, Washington, D.C., for amicus U.S. Dept. of Justice.

Frank E. Jenkins, Kirk R. Fjelstul, III, Jenkins & Eells, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before KRAVITCH, ANDERSON and BIRCH, Circuit Judges.

ANDERSON, Circuit Judge:

This case presents a challenge to a local zoning ordinance of the City of Athens, Georgia, pursuant to the 1988 amendments to the Fair Housing Act, 42 U.S.C.A. § 3601, *et seq.* (hereinafter referred to as the "FHA" or the "Act"). Appellants seek to establish a group home for recovering alcoholics in an area of Athens zoned for single-family occupancy. The district court held that there was no violation of the FHA, and appellants appealed.

I. FACTS

Appellants, John D. Elliott and C. Leonard Davis, are owners of a single lot located at 490-490 1/2 Ruth Street in Athens, Georgia, which contains two detached houses. Appellants sought to sell the property to The Potter's House, a division of the Atlanta Mission, for use as an alcohol and drug rehabilitation center. The sale was contingent on obtaining approval for the proper zoning to accommodate The Potter's House.

The City of Athens, Georgia, is divided into various zoning districts with local ordinances defining the permitted uses for each zone. Within the city limits, there are three types of single-family residential districts (RS-10, RS-15, and RS-20), two types of multi-family residential districts (RM-1 and RM-2), and several types of general residential, commercial, industrial, and governmental districts.

The property at issue is located in an area zoned RS-10 for single-family use pursuant to the local ordinance.[1] Under the ordinance, a family is defined as:

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[1] The following are permitted uses in an RS-10 zone:

(1) Single-family;
(2) Parks and recreational areas publicly owned and operated;
(3) Horticulture activities and the raising of farm animals, including horses, for noncommercial purposes;
(4) Governmental buildings--federal, state and local;
(5) Subdivision recreational areas owned, operated, and maintained by homeowners' associations exclusively for the use of residents and their guests;
(6) Family day care homes;
(7) Accessory uses as defined by section 9-1-4 and in accordance with section 9-1-14, except limited to one hundred (100) feet of setback if located in the front yard.

(continued...)

> One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a related family may have up to two (2) unrelated individuals living with them. The term "family" does not include any organization or institutional group.

Athens, Ga., Code § 9-1-4 (1987). Thus, under the ordinance an unlimited number of related persons may reside together, while a maximum of four unrelated individuals may occupy a single residence. Although the zoning ordinance permits only one single-family structure per lot, a grandfather clause allows the two structures on the Ruth Street property to remain as they were built prior to the adoption of the ordinance. As a result, two "families" or a maximum of eight unrelated persons are permitted to reside on the property.

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[1](...continued)
Athens, Ga., Code §9-1-143 (1987) (RS-10 Single-Family Residential District (10,000 square feet)).

The City of Athens adopted its definition of "family," which restricts the number of unrelated persons who may live together, in order to regulate the large student population from the University of Georgia campus located in Athens and to protect the single-family character of the neighborhoods surrounding the university. The City was attempting to prevent the adverse effects that can occur when an area increases its population density because of a large demand for rental apartments for students. The City was concerned particularly with overcrowding, traffic, noise, and the excess demand on city services such as transportation and water.

In this case, the proposed purchaser of the Ruth Street property, The Potter's House, operates an alcohol and drug rehabilitation center for men at its farm facility in Jefferson, Georgia. The male residents of The Potter's House are employed in one of the four stores operated by The Potter's House or in some part of the farm

operation. Reverend Jack Lindsay, director of The Potter's House, sought to purchase the Ruth Street property for use as a group- residence home, or "half-way" house, for men who had finished the program at the farm facility but were not yet ready to live on their own. The Athens residence home would thus serve as a second stage in the rehabilitation process, providing structure and support to those program participants who had completed the first part of the program.

The Potter's House planned to accommodate twelve male program participants[2] and at least one staff member at the Ruth Street property. Thus, the planned occupancy was in excess of the eight permitted residents under the ordinance. The program participants would be employed outside the property and would be subject to program rules prohibiting the use of alcohol

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[2] The parties stipulated at trial that the persons who would reside at the Ruth Street property are handicapped within the meaning of 42 U.S.C. § 3602(h) and are not a threat to the community under 42 U.S.C. § 3604(f)(9).

and overnight female visitation. These participants would pay $75.00 per week in exchange for their food, clothing, shelter, and supervision.

In order to carry out their project, appellants approached the City of Athens planning department to have the property rezoned to multi-family designation which would permit the proposed use for the half-way house. The planning department advised appellants that the proposed use of the Ruth Street property would be considered, under a "similar use" provision, as a boarding house.[3] Members of the planning department then studied the impact the proposed zoning change would have on the neighborhood and the demand for municipal

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[3] The definition of boarding house is:

> A dwelling in which meals and lodging or just lodging are (is) furnished for compensation to more than four (4) but not more than twenty (20) persons. Provisions for meals may be made, provided cooking is done in a central kitchen and not in individual rooms or suites. For purposes of zoning, a boarding or rooming house shall be a multiple dwelling.

Athens, Ga., Code § 9-1-4 (1987).

services. While the planning department determined that the proposed group home would not burden the provision of municipal services such as transportation, water, and sewage, the department nonetheless recommended denial of the proposed change, stating as its reasons that the rezoning would set a negative precedent for the neighborhood and would constitute spot zoning. Thereafter, the appellants requested that the City either issue an interpretation of the current ordinance which would permit the intended use under the current definition of "family" or amend the ordinance so that it would conform to the provisions of the FHA amendments.

After the City failed to issue the requested interpretation of the current ordinance or to amend the ordinance, the appellants instituted suit in the district court on November 6, 1989. Appellants sought declaratory and injunctive relief on the grounds that the City's actions violated the Fair Housing Act and their rights of

substantive due process and equal protection.[4] More particularly, appellants alleged that handicapped persons were denied the opportunity to reside within single-family residential neighborhoods in the City of Athens, Georgia, and that the City refused to make reasonable accommodations in its rules, policies, practices, or services, when such accommodations may be necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling. See 42 U.S.C. § 3604(f).

After a bench trial, the court entered judgment against the appellants. The court held that the City of Athens had set reasonable restrictions on the maximum number of unrelated persons who may occupy a single dwelling unit and, therefore, is exempt from the instant FHA claim under 42 U.S.C.A. § 3607(b)(1). In addition, the court held that appellants had not established a prima facie case of discriminatory effect. The district court did not address the "reasonable accommodations"

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[4] Appellants do not pursue their constitutional claims on appeal.

issue. On appeal, appellants challenge the district court's conclusions regarding their FHA claims. Because we conclude that the Athens ordinance falls within the exemption contained in § 3607(b)(1), we need not address the issues of discriminatory effect and "reasonable accommodations."

II. DISCUSSION

A. *Overview of Fair Housing Act and Exemptions*

The Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, enacted as Title VIII of the Civil Rights Act of 1968, was designed to prohibit discrimination on the basis of race, color, religion, or national origin in the sale, rental, and financing of housing and to assure Fair Housing practices. In 1974, sex was added as a protected class but otherwise the statute remained basically unchanged until 1988. *See* 42 U.S.C. § 3604(a). In 1988, Congress amended the Fair Housing Act to extend its protection to handicapped persons. Fair Housing Amendments Act of

1988, P.L. No. 100-430, 102 Stat. 1619 (1988) ("FHAA"). Congress recognized that discrimination against the handicapped is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect." *Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712, 717, 83 L.Ed.2d 661 (1985). The House Report states:

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (hereinafter "House Report"). In general, the Fair Housing Act makes it unlawful

> (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a

> dwelling to any buyer or renter because of a handicap....
>
> (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap....

42 U.S.C. §§ 3604(f)(1) and (2).

The FHA, however, contains a number of exemptions, which, if applicable, remove the alleged violation from the coverage of the Act. *See* 42 U.S.C. § 3604 ("except as exempted by section[] ... 3607 of this title, it shall be unlawful...."). In this case, appellees claim that the exemption relating to maximum occupancy limitations is applicable. This exemption provides: "Nothing in this subchapter limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1).

[1] While we conclude that the exemption applies in this case,[5] we note that any exemptions contained in the Act are to be construed narrowly. *See United States v. Columbus Country Club,* 915 F.2d 877, 883 (3rd Cir.1990), *cert. denied,* --- U.S. ----, 111 S.Ct. 2797, 115 L.Ed.2d 971 (1991); *United States v. Hughes Memorial Home,* 396 F.Supp. 544, 550 (W.D.Va. 1975) ("In view of the Supreme Court's holding that the Fair Housing Act must be accorded a generous construction, the general principle requiring the strict reading of exemptions from

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[5] Because we conclude that the city's action in this case falls within the maximum occupancy limitation exemption, we need not decide the precise contours of the proof which a plaintiff must adduce in order to establish a violation under the Act. *See Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (7th Cir.1977) (racial discrimination), *cert. denied,* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978); *United States v. City of Black Jack, Missouri,* 508 F.2d 1179 (8th Cir.1974) (racial discrimination), *cert. denied,* 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694 (1975); *Familystyle of St. Paul v. City of St. Paul, Minn.,* 728 F.Supp. 1396 (D.Minn.1990) (discrimination against the handicapped), *aff'd,* 923 F.2d 91 (8th Cir.1991); *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Admin. (A.R.P.E.),* 740 F.Supp. 95 (D.Puerto Rico 1990) (same); *Baxter v. City of Belleville, Ill.,* 720 F.Supp. 720 (S.D.Ill. 1989); *see also Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (addressing an alleged violation of § 504 of the Rehabilitation Act of 1973).

the Act applies here with even greater force.") (citation omitted). In fact, none of the few courts that have considered the exemptions have found them applicable. *See, e.g., United States v. Columbus Country Club, supra,* (religious organization exemption and private club exemption); *United States v. Hughes Memorial Home,* 396 F.Supp. 544 (W.D.Vir.1975) (religious organization exemption); *Park Place Home Brokers v. P-K Mobile Home Park,* 773 F.Supp. 46 (N.D.Ohio 1991) (housing for older persons exemption); *Lanier v. Fairfield Communities,* Inc., 776 F.Supp. 1533 (M.D.Fla.1990) (housing for older persons). Acknowledging the narrowness of the exemption, we turn to § 3607.

B. *Maximum Occupancy Limitation Exemption*

In this appeal, appellants present only two arguments to support their position that the exemption is inapplicable: first, appellants argue that the ordinance is not a maximum occupancy limitation because it does not apply to all occupants, but only to those occupants who

are unrelated; and second, appellants argue that the exemption does not apply because the ordinance is unreasonable.

1. The Athens Ordinance is a Maximum Occupancy Limitation

[2] Appellants argue that the district court erred in holding that the ordinance falls within the exemption contained in 42 U.S.C. § 3607(b)(1). Appellants argue that the ordinance at issue cannot be characterized as a maximum occupancy limitation within the meaning of § 3607. Appellants urge that § 3607(b)(1) pertains only to restrictions setting a "maximum number of occupants" and that the ordinance in this case does not set an absolute maximum because there is no limit placed on the number of family members who may reside together; here the limitation is only on unrelated persons. Appellants suggest that the only maximum occupancy limitation that Congress contemplated was a limitation on the number of persons per square foot of dwelling space.

Such a limitation would apply to all persons living together, whether related or not. In support of their argument, appellants cite the following passage of the House Report, stating that the maximum occupancy limitation exemption is:

> not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were *applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.*

House Report at 31; 1988 U.S.C.C.A.N. at 2192 (1988) (emphasis added).

In addressing appellants' argument that the ordinance restricts only unrelated occupants, cases that examine discrimination, under a constitutional analysis rather than under the FHA, are helpful. In *Moore v. City*

of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), the Supreme Court held that an ordinance that limited occupancy to members of a single family, but that defined family so narrowly that a grandmother was not permitted to live with her grandson, violated the Due Process Clause of the Fourteenth Amendment. In reaching its decision, the Court emphasized its reasons for protecting family living situations:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

97 S.Ct. at 1938 (footnotes omitted).

Moore distinguished *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), because the zoning ordinance there affected only *unrelated* individuals, and did not limit the number of family members permitted to live together. In *Belle Terre*, the Supreme Court rejected a constitutional

challenge to a zoning ordinance which limited single family dwellings to a maximum of two unrelated persons or to any number of persons related by blood, adoption or marriage. Six students at a nearby college sought to live in a house together and were denied permission. The Supreme Court held that the zoning ordinance was rationally related to legitimate interests relating to density, traffic, and quiet, open spaces for families.

Reading *Belle Terre* and *Moore* together, it is apparent that Supreme Court precedent sanctions zoning limitations based upon the number of unrelated persons living together as a means of furthering the state's legitimate interest in controlling density, notwithstanding the absence of a similar limitation on related persons. In light of this legal reality, and in light of the prevalence of zoning regulations which limit unrelated persons without a simultaneous limitation upon related persons, see *Moore,* 431 U.S. at 513-21, 97 S.Ct. at

1942-47 (Stevens, J., concurring),[6] we decline to accept appellants' construction of congressional intent. We do not believe that Congress intended that the maximum occupancy limitation exemption would apply *only* to a limitation on the maximum number of persons per square foot of dwelling space. A careful reading of the legislative history demonstrates that Congress was merely giving examples of the type of restrictions on occupancy that would be reasonable. *See* House Report at 31; 1988 U.S.C.C.A.N. at 2192 ("*A number of jurisdictions* limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit.") (emphasis added). The list of reasonable restrictions listed in the House Report is not meant to be exhaustive.

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[6] The record establishes that the zoning limitation in this case is commonplace. A majority of counties and municipalities limit the number of unrelated persons who may reside in a dwelling. *See* District Court Opinion at 6; *see also* R2-237.

In the instant case, the City of Athens was attempting to prevent overcrowding in the area surrounding the university without restricting family members unnecessarily. At trial, the City presented evidence that limiting unrelated individuals was the most workable solution in order to maintain the residential character of the neighborhood. The City felt that a restriction based on square footage, applicable to both related and unrelated persons, would not be feasible because too low a number would cause a family to move if a child were born while too high a number would defeat the ability of the City to protect single-family neighborhoods.

Our reasoning finds support in *Doe v. City of Butler, Pa.*, 892 F.2d 315, 321 (3d Cir.1989). There, the Third Circuit concluded that a zoning regulation was rationally related to legitimate state interests in controlling density, notwithstanding the fact that the regulation limited to six the number of unrelated persons who could occupy a single dwelling unit while imposing no limitation

upon the number of related persons. The court rejected the argument that the zoning restriction was not related to density control because there were no limits placed on the occupancy of related persons. Applying reasoning similar to our own, the Third Circuit stated: "If the absence of an occupancy limitation on the members of a family who can live together is boot-strapped into the argument that therefore there can be no occupancy limitation for unrelated persons living together, there could never be such an occupancy limitation and *Belle Terre* would be meaningless." 892 F.2d at 321. In other words, *Moore* and *Belle Terre*, read together, indicate that a feasible method of controlling density is to place occupancy limitations on unrelated persons but not on related persons.

Having concluded that the Athens zoning restriction is a maximum occupancy limitation, we turn to appellant's argument that the Athens ordinance is unreasonable.

2. Reasonableness of the Athens Ordinance

[3] The § 3607(b)(1) exemption applies only to *reasonable* restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Appellants argue that the Athens, Georgia, ordinance is unreasonable because it has a disparate impact on handicapped individuals. In determining the reasonableness of the ordinance, this court must strike a balance between a municipality's interest in maintaining the residential character of a particular area and the interests of the handicapped in remaining free from a zoning restriction having some disparate impact.[7] Courts have long

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[7] In *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court recognized the need to balance the interests of the handicapped against those of the recipients of federal funds in the context of § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 794:

> [*Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)] ... struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substan-

(continued...)

recognized that local governments have broad power in zoning. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926) ("[B]efore [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

We turn then to the evidence of discrimination adduced by appellants at trial. The only evidence of disparate impact[8] upon handicapped persons adduced

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[7](...continued)
tial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.

Alexander, 469 U.S. at 300, 105 S.Ct. at 720.

While we are construing the FHA and not the Rehabilitation Act of 1973, the above cases are still useful to our analysis. Because the legislative history likens the purposes of the FHA amendments to that of the Rehabilitation Act of 1973, *see* House Report at 18, we look to cases interpreting the Rehabilitation Act in order to construe the FHA. Nonetheless, we note that "too facile an assimilation of [§ 504] law into [the Fair Housing Act] must be resisted." *Alexander v. Choate*, 105 S.Ct. at 716 n. 7 (assimilation of Title VI into § 504).

[8] The district court concluded that the City did not intend to discriminate against handicapped persons, and appellants do not challenge this conclusion on appeal. Appellants assert only that the (continued...)

by appellants was the fact that appellants' proposed use for handicapped persons was rejected and the testimony of Reverend Lindsay that a group home for recovering alcoholics in Athens, Georgia, could not be economically feasible with fewer than 12 residents. There was no attempt to establish that the ordinance had a harsher effect on handicapped persons wanting to live in group homes than on college students or other non-handicapped persons desiring to live in group homes. While we assume *arguendo* that the ordinance had some disparate impact upon handicapped persons,[9] we conclude that the evidence of disparate impact upon handicapped persons is extremely weak.

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[8](...continued)
City's application of the zoning ordinance has a disparate impact on handicapped persons.

[9] The district court concluded that appellants had failed to prove disparate impact. In light of our resolution of this case, we need not address appellants' challenge to this conclusion. However, it is clear that the evidence of disparate impact adduced by the appellants in this case is very weak, and this fact is significant to our analysis.

Weighed against the foregoing rather slim evidence of disparate impact upon handicapped persons are the City's very substantial interests in controlling density, traffic, and noise in its single family residential districts, and in preserving the residential character of such districts. The City's purpose in adopting the zoning restriction at issue was to control the large University of Georgia student population. The City adopted its definition of "family" in the ordinance in order to protect the character of single-family neighborhoods and regulate the negative effects emanating from the student population such as overcrowding, traffic, and noise.

At trial, the City presented the testimony of Mr. Leon Eplan, a land use planner and currently the Commissioner of Planning and Development for the City of Atlanta, Georgia. Eplan testified about the effects that a large student population can have on the surrounding residential neighborhood absent measures aimed at restricting occupancy. Eplan cited the Home Park area

surrounding Georgia Tech University in Atlanta, Georgia, as an example of an area that has gone from being primarily residential to an area that has increased in density, is primarily rental property, and is no longer suitable for single-family dwellings because of the increased noise and traffic. As the student population grew, the residents found it profitable to rent to students. At the time that this demand for off-campus housing grew, there was no city ordinance in place that would limit the density in the area. Thus, the neighborhood has changed its character dramatically over the years.

As noted above, and as the district court found, *see* District Court Opinion at 7, the most practical means of accomplishing the City's legitimate interests was a limitation on the number of unrelated persons permitted to occupy a single dwelling. The Athens restriction has the following primary effects in the affected single family residential districts: (1) to control the number of college students who may rent a single dwelling; (2) to exclude

boarding houses; and (3) to exclude fraternity and sorority houses. All are clearly legitimate and serve important interests of the City. In addition, of course, the restriction had the incidental effect of excluding group homes such as the one proposed by appellants, at least those which cannot be economically operated with the permitted number of residents.

In considering whether the City's legitimate interests outweigh the disparate impact upon handicapped persons, it is also relevant that there are other areas in the City that would be available for group homes. The City presented evidence at trial that such a group home would be permitted to operate in the following zones: R.M. 1 and R.M. 2 (both multi-family residential zones); O.I. (office institutional); O.I.B. (office institutional and limited commercial), L.B. (local business); G.B. (general business), C.B.D. (central business district), and H.B. (highway business). R2-168-174. Thus, it appears that group homes of the kind appellants

propose would be permitted in other residential areas of the city, as well as non-residential areas.

The Athens ordinance on its face does not draw a line between handicapped individuals and non-handicapped individuals. Rather, the legislative line was drawn between related and unrelated individuals, a distinction which Supreme Court precedent clearly permits. *See Moore* and *Belle Terre, supra.* While a local government cannot exclude handicapped individuals on the premise that "they can go elsewhere,"[10] the Fair Housing Act amendments do not require a local government to permit handicapped individuals to live wherever they desire. The Act provides only that handicapped individuals be given meaningful access to housing in a nondiscriminatory fashion. While it may be true that handicapped individuals have a greater need to reside in group settings, the City of Athens has other

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[10] See Michael P. Seng, *Discrimination against Families with Children and Handicapped Persons under the 1988 Amendments to the Fair Housing Act,* 22 J. Marshall L.Rev. 541, 560 (1989).

zones that permit such access for handicapped and other individuals.

We conclude that the zoning restriction as applied in this case is reasonable, and thus the exemption is applicable. Appellants have adduced only weak evidence of disparate impact upon handicapped persons. On the other hand, the City has adduced evidence of strong and legitimate interests in controlling density, traffic, and noise in its single-family residential districts, and in preserving the residential character thereof. The City not only demonstrated that its restriction upon the number of unrelated persons who may occupy a dwelling is the only practical method of serving its legitimate interests but also adduced evidence that comparable restrictions are commonplace in the zoning regulations of counties and municipalities. The exemption contained in § 3607(b)(1) relating to maximum occupancy limitations is an attempt on the part of Congress to advance the interests of the handicapped without interfering

seriously with reasonable local zoning. In this case, the City has preserved meaningful access for group homes for handicapped persons in its residential areas. We conclude that the zoning restriction, as applied under the circumstances of this case, is reasonable, and thus that the § 3607(b)(1) exemption is applicable.

Finally, appellants argue that the fact that the ordinance has some disparate impact upon handicapped persons means, *ipso facto,* that the ordinance is unreasonable. Our research has uncovered no support in the case law for that proposition. To the contrary, the relevant case law suggests otherwise. In *Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court held that a Medicaid regulation, which had a disparate impact upon handicapped persons, nevertheless did not violate § 504 of the Rehabilitation Act of 1973.[11] The Supreme Court ex-

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[11] Cases interpreting the Rehabilitation Act of 1973 are useful in the FHA context. See footnote 7, *supra.*

pressly rejected the argument that every disparate impact discrimination would violate the Act:

> At the same time, the position urged by respondents--that we interpret § 504 to reach all action disparately affecting the handicapped--is also troubling. Because the handicapped typically are not similarly situated to the non-handicapped, respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden.... Had Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring preparation of "Handicapped Impact Statements" before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose. Thus, just as there is reason to question whether Congress intended § 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination.

Id. at 298-99, 105 S.Ct. at 718-19 (footnote omitted).

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978), the Seventh Circuit expressly rejected the argument that once a racially discriminatory effect is shown, a violation of § 3604(a) of the Fair Housing Act is necessarily established. The Seventh Circuit held:

> We decline to extend the reach of the Fair Housing Act this far. Although we agree that a showing of discriminatory intent is not required under § 3604(a), we refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases.

Id. at 1290. To the same effect, *see United States v. City of Blackjack, Missouri,* 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694 (1975).

[4] It is true that the context of the foregoing cases is not precisely the same as this case. The above

cases were addressing the issue of whether there was a violation of the Rehabilitation Act of 1973 and the Fair Housing Act, respectively. In the instant case, the issue is the application of an exemption from the coverage of the Fair Housing Act. More precisely, the issue now under discussion is whether an otherwise reasonable zoning restriction is unreasonable, thus nullifying the exemption, *solely* because it has some disparate impact on handicapped persons. We conclude, however, that the rationale of the foregoing cases is relevant and persuasive. The fact that Congress did not intend that every disparate impact discrimination would violate the Rehabilitation Act of 1973 or the Fair Housing Act provides strong evidence that Congress also did not intend that every zoning restriction based on maximum occupancy would necessarily be unreasonable, and therefore nonexempt under the Act, merely because the

restriction had some disparate impact upon handicapped persons. Thus, we reject appellants' final argument.[12]

[5] For the foregoing reasons, the Athens, Georgia, zoning ordinance was reasonable as applied in this case. We conclude that § 3607(b)(1) exempts the City's action from the coverage of the Act.[13]

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[12] In evaluating whether the zoning ordinance is "reasonable" as required by the exemption, the dissent suggests that the reasonable accommodation provision of the Act should apply, in addition to discriminatory intent and disparate impact. We disagree; we do not think the reasonable accommodation provision is per se applicable. The statute expressly provides an exemption from the Act; if the exemption applies, then the other provisions of the Act, including the reasonable accommodation provision, do not apply. In addition, the construction suggested by the dissent would effectively nullify the exemption; that is, under the dissent's construction, the only time the exemption could apply is when there is no statutory violation in the first place. We need not decide whether the failure to make an accommodation might in other circumstances result in a determination that a zoning restriction was unreasonable, and thus the exemption inapplicable. In other words, we need not decide whether the concept of accommodation can in some circumstances inform the concept of reasonableness. We need not decide that issue in this case because it is clear that the accommodation sought by appellants would require nothing less than an exception to the zoning restriction, an exception which is not available to college students or others whose circumstances also make such group living desirable. Under the circumstances in this case, we cannot conclude that the city's refusal to make an exception for appellants is unreasonable.

[13] Because we appear to be the first appellate court to rule on this particular exemption, we take the time to distinguish a few cases where courts have found violations of the Fair Housing Act because of discrimination against the handicapped. These cases, while not (continued...)

[13](...continued)
considering the exemption, demonstrate that refusals to grant zoning variances or to rezone to accommodate handicapped facilities are to be examined closely for discriminatory intent or effect.

In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the Supreme Court held that a city's refusal to grant a special use permit to allow construction of a group home for the mentally retarded violated the equal protection clause of the fourteenth amendment. In *Cleburne,* the city required special use permits for the operation of group homes for the handicapped but did not require permits for other uses such as hospitals and nursing homes in the same area. The city attempted to justify its requirement on the grounds that it was concerned with the negative attitude of property owners, that students from a school across the street from the proposed site might harass the residents, and that the location was on "a five hundred year flood plain." In addition, the city did put forth some concerns about population density, but failed "to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit." 105 S.Ct. at 3260. The Court rejected the City's arguments and concluded that the reasons given for the special use permits were not rationally related to a legitimate government purpose. 105 S.Ct. at 3258.

The present case can be distinguished from *Cleburne* in two respects. First, this case does not involve the requirement of a special use permit for the operation of The Potter's House. Group homes for the handicapped are not singled out and treated differently than any other dwelling that would house a large number of unrelated persons. *See also Doe v. City of Butler, Pa.,* 892 F.2d 315 (3d Cir.1989) (distinguishing *Cleburne* on same ground). Second, while in *Cleburne,* there were other group dwellings in the same area, there is no evidence in the present case that the City of Athens has recently permitted other groups to locate in a single-family zone. Therefore, the City's concerns relating to density are more credible as the ordinance has been applied across the board to uphold the residential character of the Ruth Street neighborhood. Thus, the City of Athens ordinance does not appear to rest on an irrational fear of the handicapped such that the FHA is violated.

(continued...)

Accordingly, the judgment of the district court is

AFFIRMED.

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[13](...continued)

Similarly, in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2nd Cir.), *aff'd*, 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988), the Second Circuit found that a town violated the Fair Housing Act by refusing to rezone a parcel for multi-family housing. In *Huntington*, the overwhelmingly white suburban town had an ordinance that, on its face, limited the private construction of multi-family housing to one urban renewal area in town, where 52% of the residents belonged to a minority. 844 F.2d at 930. In addition, the only justification for the ordinance proffered by the town was that it encouraged developers to invest in that area of town. Under these circumstances, the court of appeals found a disparate racial impact and a violation of the FHA. The Supreme Court affirmed stating that "we are satisfied on this record that disparate impact was shown, and the sole justification proffered to rebut the *prima facie* case was inadequate." 109 S.Ct. at 277.

In distinguishing *Huntington*, we note that the ordinance involved in that case could not be characterized as a maximum occupancy limitation within the meaning of § 3607. The ordinance there was not singled out for special exempt status by Congress as was the Athens ordinance. In addition, multi-family housing was relegated to one particular area of Huntington; such is not the case in Athens. The group home proposed by appellants could be located under the zoning ordinance in several other areas of Athens, including residential areas. Finally, the *Huntington* court found a substantial adverse impact upon minorities and weak and inadequate town justifications, 844 F.2d at 938, 940; by contrast, the disparate impact in this case is extremely weak and the city's legitimate interests are very substantial.

KRAVITCH, Circuit Judge, dissenting:

The majority holds that the Athens ordinance restricting the maximum number of unrelated occupants living in homes zoned for single families does not violate the Fair Housing Amendments Act. This conclusion stems from the majority's belief that the ordinance falls within a statutory exemption permitting reasonable maximum occupancy restrictions that apply *equally* to all occupants.

In my view, the ordinance in question is neither reasonable nor an occupancy limitation that applies equally to all individuals. In addition, I disagree with the majority's disparate impact analysis which fails to recognize the specific definition of discrimination contained in section 3604 of the Fair Housing Amendments Act. I therefore respectfully dissent from the majority opinion.

I. THE EXEMPTION

The majority holds that the Athens ordinance falls within the section 3607(b)(1) exemption of the FHAA because the ordinance is a reasonable occupancy limitation. This result, however, cannot be reconciled with either the plain words of the statute or its legislative history.

A. Maximum Occupancy Limitations

Section 3607(b)(1) exempts certain ordinances from the requirements of the FHAA:

> Nothing in this subchapter limits the applicability of any **reasonable** local, State, or Federal restrictions regarding the **maximum number of occupants** permitted to occupy a dwelling.

(emphasis added). In its opinion, the majority seeks to reconcile this exemption with case law implying that a maximum occupancy limitation would be unconstitutional if applied to families. See *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94

S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Doe v. City of Butler, Pa.*, 892 F.2d 315, 321 (3d Cir.1989).[1] This perceived constitutional prohibition means that a municipality can only rely on the section 3607 exemption for ordinances which apply to unrelated occupants; an ordinance which applies to families would be struck down as unconstitutional before an FHAA analysis was ever begun. Consequently, if we do not find that the Athens ordinance falls within the section 3607 exemption (because it inequitably applies only to unrelated occupants), we will have created a situation in which no ordinance can ever fall within the exemption. In other words, we will have rendered the exemption meaningless.

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[1] For purposes of this analysis, I assume that the majority is correct in its belief that it would be unconstitutional to apply a maximum occupancy limitation to families. A court might infer this result from case law; the Supreme Court, however, has not directly addressed this issue. Indeed, one concurring justice in *Moore* noted that a city could achieve the goal of population limitation through a restriction that is reasonably related to the ends of preventing overcrowding, i.e., absolute restrictions on the number of occupants, whether they be related or unrelated. 97 S.Ct. at 1946, n. 16 (Stevens, J. concurring). In *Doe,* a non-controlling Third Circuit case, the court did state, in dictum, that a maximum occupancy restriction cannot constitutionally be applied to limit the number of family members permitted to share a dwelling.

The majority correctly notes that we are obligated to read the statute in a manner that does not render it ineffectual. I agree that "[i]t is our duty to give effect, **if possible** , to every clause and word of a statute, rather than emasculate a section." *United States v. Menasche,* 348 U.S. 528, 538-39, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) (citations omitted, emphasis added). The majority, following the reasoning of *Doe*, argues that we will be violating this duty if we "emasculate" the statute by finding that the Athens ordinance does not fall within the section 3607 exemption.

Although I agree with the sentiments of the majority concerning our obligation to "save" the exemption, I disagree with the majority's application of this doctrine. Underlying our duty to give meaning to each word of a statute is the presumption that in so doing we will most effectively fulfill the intent of Congress. However, when more explicit evidence of Congressional intent is available, it makes sense to give effect to such evi-

dence rather than resort to an artificial reading of a statute.

In this case, the legislative history unambiguously states that maximum occupancy limitations are only permissible if "applied **equally to all occupants,** and [do] not operate to discriminate on the basis of ... handicap." House Report at 31; 1988 U.S.C.C.A.N. at 2192 (1988). The Athens ordinance does not apply "equally" to all occupants; it only applies to unrelated occupants. We should not ignore this clear statement of Congressional intent and squeeze the Athens ordinance into an exemption from which it is so obviously excluded, even if effectuating Congressional intent *may* mean rendering the exemption useless.[2] Our mandate to

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[2] Our reading of the exemption and the legislative history is particularly appropriate given the lack of a clear Supreme Court statement of the applicability of occupancy restrictions to families. *See supra* note 1. In addition, it is important to note that a negation of the exemption would not prohibit municipalities from effectuating the goal of population limitations. Maximum occupancy ordinances not protected by the section 3607 exemption would merely be subject to the provisions of the FHAA. In the case at hand, these provisions would require the city to make reasonable accommodations like those discussed *infra*.

render every word of a statute meaningful is not absolute. We are only required to save a statute "if possible," *Menasche,* 348 U.S. at 538-39, 75 S.Ct. at 520, and in this case, the plain wording of the statute and the legislative history makes the reading suggested by the majority impossible.

B. Reasonable Limitations

Even if the ordinance is a maximum occupancy limitation as defined by the exemption, it cannot be considered "reasonable". Section 3607(b)(1).

The majority seeks to prove the reasonableness of the ordinance by balancing the interests of the handicapped in access to housing against the municipality's interests in maintaining the residential character of a particular neighborhood. In an attempt to measure the harm to the handicapped population, the majority engages in a discussion of the "discriminatory impact" of the ordinance. Rather than recognize the *specific definition of discrimination contained in the FHAA,* the

majority uses a disparate impact analysis that not only ignores the mandate of the statute, but is inappropriate in the context of evaluating *discriminatory* impact on handicapped persons.

Section 3604(f)(3) of the FHAA states that:

> For the purposes of this subsection, discrimination includes--
>
> (B) **a refusal to make reasonable accommodations** in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

(emphasis added). The statute explicitly equates discrimination with a failure to make reasonable accommodations and nowhere implies that a disparate impact analysis is appropriate. Indeed, a disparate impact analysis is particularly inappropriate in the situation of handicapped individuals. Such an analysis should be undertaken in situations in which groups that are entitled to equal treatment are not being treated as equals, not when a protected group is entitled to special treatment. Because handicapped people are entitled by law to

preferential treatment and because preferential treatment is necessary to afford them equal access to housing, a disparate impact analysis is useless in this context and in fact negates the entire intent of including handicapped people within the FHAA.

In its opinion, the majority fails to mention the definition of discrimination set forth in the statute. Instead, it opines that a) "[t]here was no attempt to establish that the ordinance had a harsher effect on handicapped persons wanting to live in group homes than on college students or other non-handicapped persons desiring to live in group homes," and that b) in any case, the evidence of disparate impact is "extremely weak."

The majority's disparate impact language appears to stem from the district court's order which relied on *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (7th Cir.1977). *Metropolitan* holds that the only way to prove a Fair Housing

Act violation is by 1) a showing of discriminatory intent towards the protected class, or 2) proving disparate impact upon the protected class. *Metropolitan,* a racial discrimination case under the old FHA, was decided well before the amendments to the Act which added protection for handicapped people. The *Metropolitan* standard is superseded by the FHAA, which specifically defines a violation with respect to handicapped claimants.

Doe, which the majority relies upon to bolster its analysis, similarly is inapplicable to this case because it involved an allegation of discrimination on the basis of sex. In *Doe,* plaintiffs challenged, as sexually discriminatory, a local zoning ordinance that limited the number of unrelated occupants to six and consequently excluded a battered woman's shelter from the area. The court upheld the ordinance reasoning that there was no greater impact on these *women* than on a group of recovering *male* alcoholics seeking to establish a group home in the same neighborhood. *Id.* at 323. Reliance

on *Doe* is as misplaced as reliance on *Metropolitan*; both these cases involve complaints of inequitable treatment by groups who are entitled to be treated as equals. In the case at hand, the potential occupants of the house are requesting inequitable treatment, treatment to which they are entitled by operation of the FHAA.

It is irrelevant, therefore, that the appellants may have failed to prove disparate impact. To establish a violation of the FHAA, they are only required to prove discrimination, i.e., a failure of the city to make reasonable accommodations that *may* be necessary to allow them equal access to housing. Section 3604(f)(3).[3]

C. Balancing

The majority weighs the "weak evidence" of disparate impact on the handicapped men against the governmental interest in controlling density, traffic, and

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[3] The language of the statute is liberal. Reasonable accommodation is required if such concession *may* be necessary to a handicapped person's ability to use and enjoy a dwelling. Section 3604(f)(3).

noise in its single-family residential districts. Even if the standard required such a balancing of interests,[4] the ordinance would still violate the FHAA. It is the governmental interest here that is weak, as evidenced by the municipal planning department's determination that the proposed group home "would not burden the provision of municipal services such as transportation, water, and sewage." In comparison, the interest of the handicapped men is strong because they are being denied a statutorily defined right: the reasonable accommodation necessary to afford them equal opportunity to use and enjoy the particular dwelling.

D. Reasonable Accommodation

Prior to instigating this litigation, plaintiffs suggested two accommodations that would have prevented the Athens ordinance from violating the FHAA. They asked the city to redefine "family" to include groups of handi-

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[4] As mentioned above, the proper question is whether or not reasonable accommodations have been made, not what the relative impacts are.

capped people who may need to live in group situations because of their handicap. In the alternative, they requested a spot exemption to allow this particular group home to operate at the proposed located despite the single family zoning requirement. Given the balancing discussion provided above, either of these routes must be considered no more than the "reasonable accommodation" required by the FHAA.

II. CONCLUSION

Because the Athens ordinance does not apply *equally* to all potential occupants and because the city has discriminated against this group of recovering alcoholics by not making reasonable accommodations, I believe the city has violated the FHAA. I therefore respectfully dissent from the majority opinion.

APPENDIX 2
Opinion of the U.S. District Court, N.D., Ga.,
Dated January 23, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

John D. Elliott and C. Leonard,	)	
Plaintiffs,	)	Civil Action File No. 89-89-ATH(DF)
The City of Athens, Georgia, and the Mayor and Council of the City of Athens, Georgia, Dwain P. Chambers, Miriam Moore, Harry Sims, Cardee Kilpatrick, Kathy Hoard, Linny Bailey, Mac Coile, Carolyn Reynolds, Gwen O'Looney, and Calvin Bridges,	)	
Defendants.	)	

DEFENDANTS' PROPOSED ORDER

Findings of Fact

The Plaintiffs in this case are not handicapped. They are the owners of two detached single-family

homes located on a single lot at 490-490 1/2 Ruth Street in the City of Athens, Georgia. The Ruth Street property was purchased by Plaintiff John Elliott in a foreclosure sale on the courthouse steps. Plaintiff Elliott later sold a one-half interest in the subject property to Plaintiff Len Davis. Both intended to use the property for financial investment.

At the time the property was purchased, the Plaintiffs did not have a particular buyer in mind. Plaintiff Elliott is in the real estate business and the property was listed with the company for which he is an agent.

The Reverend Jack Lindsay, director of The Potter's House, expressed an interest in purchasing the subject property from the Plaintiffs for use as a halfway house for twelve recovering alcoholics and drug addicts. The Potter's House, a division of the Atlanta Union Mission, is a drug and alcohol rehabilitation center located on a farm near Winder, Georgia.

The halfway house was to be used as a final stop for individuals at the farm before being released back into the general population. Other residents would be permitted to live in the halfway house upon request of other social agencies in or around the Athens area. Residents of the halfway house were to have a job where they would work full-time. They would be provided with all of their needs including food, clothing, shelter and supervision. In turn, each resident would be charged $75.00 per week.

The Potter's House and the Plaintiffs entered into a contract whereby The Potter's House agreed to purchase the Ruth Street property for $73,000.00, contingent upon the Plaintiffs obtaining the proper zoning.

In accordance with the City of Athens, Georgia Zoning Map, the Ruth Street property is located in a low density single-family residential zoning district (RS-10). The Zoning Ordinance for the City of Athens, Georgia

provides that the only permitted residential use on a lot in an RS-10 district is one single-family detached dwelling.

Those people who are permitted under the zoning ordinance to live in a single- family dwelling are limited by the definition of the term "family" as found in the zoning ordinance. That definition of family provides, as follows:

> One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a related family may have up to two (2) unrelated individuals living with them. The term "family" does not include any organization or institutional group.

The undisputed testimony of the Assistant Planning Director for the City of Athens, Georgia, Kenneth Suddreth, was that in accordance with the definition, persons are permitted to reside in a single-family dwell-

ing regardless of the use, so long as the limits on numbers are respected.

In keeping with the definition, Mr. Suddreth explained that all persons are treated the same and under the terms of the zoning ordinance up to four unrelated persons are permitted to reside in a single-family dwelling, whether they are handicapped or not.

The RS-10 district permits one single-family structure per lot, but because the two structures were located on the Ruth Street lot prior to the adoption of the ordinance, a grandfather clause allows the two single-family dwellings to remain. As a result, up to eight unrelated persons are permitted to reside on the Ruth Street property, whether they are handicapped or not.

The planning department advised the Plaintiffs that the proposed use was not permitted on the Ruth Street property because twelve residents exceeded the restrictions for the number of unrelated persons. The department further advised the Plaintiffs that the only permitted

use was a "boarding house" because up to twenty persons were permitted to reside in such a dwelling. A boarding house is not permitted in an RS-10 zoning district and, as a result, the Plaintiffs applied to have the Ruth Street property rezoned to an RM-2 multi-family district where a boarding house is permitted.

The planning department staff recommended denial of the application for reasons that the Ruth Street property is located in a single-family district and rezoning the property to multi-family would set a negative precedent for the neighborhood's future and it would constitute spot zoning. The planning commission voted to recommend denial of the application and the city council voted unanimously to deny the application. The vote was ten to zero.

All of the property along Ruth Street is zoned RS-10. There is a multi-family district with an apartment complex located behind the Plaintiffs' property, but access is by another street not connected with Ruth

Street and a fence buffers the property. Photographs taken by the planning department demonstrate that Ruth Street is distinctly residential.

There is no question that the Plaintiffs do not challenge the denial of the rezoning. The Complaint, the Pre-trial Order, and statements of Plaintiffs' counsel demonstrate that the Plaintiffs challenge the definition of family in the ordinance. Further, letters sent by the Plaintiffs to the city request that the city comply with the Fair Housing Act by otherwise interpreting the ordinance or by amending it. Nowhere is there a contention that the denial of the rezoning request by the Defendant is related to the Plaintiffs' claims.

Beyond the usual reasons for zoning and planning, this Court finds that the presence of a major university, the University of Georgia, has a major impact on the City of Athens, Georgia, and presents unique problems in terms of planning and zoning. Mr. Suddreth testified that the number of students attending the

university exceeds by a large margin the available on-campus housing. The demand for housing the remainder of the students creates an excessive rental market. Moreover, the limited financial means of students creates a desire to fit large numbers of people into the available units in order to share costs. Finally, the boisterous nature of college students creates noise and safety problems that are increased when the numbers are increased.

The disastrous effects on the residential character of a neighborhood when unrelated persons are not limited in a university town were demonstrated by Mr. Leon Eplan. Mr. Eplan is a land use planner and is currently the Commissioner of Planning and Economic Development for the City of Atlanta, Georgia. He cited the Homewood neighborhood around Georgia Tech University as an example. Homewood began as a very prominent single-family neighborhood. As the university grew and the demand for student housing increased, it

became profitable to rent homes in the neighborhood to students by increasing the density of use. Unfortunately, at the time this occurred, Atlanta had no zoning ordinance and student rentals occurred unchecked. Student rentals destroyed the single-family character of the neighborhood and made it unattractive for family living. By the time zoning was introduced to Atlanta, single-family zoning was no longer appropriate.

Both Mr. Eplan and Mr. Suddreth testified that limiting the number of persons that may reside in a dwelling by limiting the number of unrelated persons is the method used by the vast majority of counties and municipalities. Similarly, the number four is the most common limitation. Athens chose the number four by rounding up the 1960 census figure for average household size. Since 1960 average household size has fallen to less than three, but the city has chosen not to reduce its limit.

Further, Mr. Eplan testified that in protecting a single-family neighborhood, limiting the number of unrelated persons is important because the larger percentage of unrelated persons residing together are adults. This is significant because adults have a greater negative impact on the environment. For example, adults generate more noise and have cars that require parking space.

When the number of unrelated persons gets above four or five, the impact begins to destroy the single-family character. Permitting twelve persons, as the Plaintiffs suggest, would cause a very abrupt change that would not be consistent with the residential character of the neighborhood.

The Plaintiffs have suggested alternatives for limiting the number of persons permitted to reside in a single-family dwelling, both of which are designed to provide equal treatment of persons, regardless of whether they are related. First, the Plaintiffs suggest

limiting the number of persons on a square footage basis and second, the Plaintiffs suggest placing a limit per dwelling without regard to relationship of the individuals. This Court finds that neither of these alternatives is practical or workable. Mr. Eplan testified that although a very few jurisdictions have adopted such methods, they are unworkable. Among other things, a family would be forced to move when a child was born that caused the limit to be exceeded. If the limit were set high enough to avoid such an unpleasant scenario for related persons, the purpose for setting the restrictions would be defeated. This would be especially harmful in a college town. Permitting twelve persons, as the Plaintiffs suggest, would clearly defeat the ability of the city to protect single-family neighborhoods.

The only attempt by the Plaintiffs to present evidence of disproportionate impact of the ordinance on handicapped persons consisted of a statement by Plaintiff Elliott that he had not seen any halfway houses

in the City of Athens. The Reverend Lndsay testified, however, that a halfway house would never advertise itself with a sign because it would violate the purpose of a halfway house--that purpose being one of resembling family life and maintaining a low key to allow for gradual reintroduction into the mainstream. Mr. Suddreth testified that the planning department has no information regarding halfway houses because they do not require special approval or permits.

The only evidence that the zoning ordinance had the effect of excluding The Potter's House from using the Ruth Street property as a halfway house was presented by The Reverend Jack Lindsay. He testified that the proposed halfway house was to have twelve residents. The residents would be employed during their tenure at the halfway house and would be provided with all of their needs, including food, shelter, clothing and supervision. In exchange, the residents would be charged $75.00 per week. Reverend Lindsay's intention was that The

Potter's House would be self-sufficient from the amounts charged the residents. He also testified that any shortfall would be made up by The Potter's House and by church sponsors in the local community. As to the basis for the charge of $75.00 per week for each resident, The Reverend Lindsay stated that he wanted to charge less than the $125.00 to $150.00 per week that was the customary amount charged in Atlanta, Georgia. He said that he never considered charging more than $75.00 per week because he wanted to provide a "bargain" to the residents. The Reverend Lindsay also stated that he never considered having fewer than twelve residents at the halfway house. When The Reverend Lindsay was asked to provide information as to the costs for maintaining the Ruth Street property, he stated that the information he had with him at trial was for a different piece of property in the City of Athens.

Conclusions of Law

I. Fair Housing Act

A. Introduction

The Plaintiffs contend that by virtue of the zoning ordinance of the City of Athens, Georgia, the city has precluded the sale of a home to The Potter's House for use as a halfway house for recovering alcoholics and drug addicts. As a result, the Plaintiffs contend that the city has violated the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601, et seq. More particularly, the Plaintiffs allege that handicapped persons are denied the opportunity to reside within single-family residential neighborhoods in the City of Athens, Georgia. As is set out above, the basis for the claim rests with the definition of single-family which permits an unlimited number of related persons to reside in a single-family dwelling, but restricts the number of unrelated persons to four.

It was undisputed that handicapped persons, or any other persons, are permitted to reside in a single-

family dwelling provided that the limit of four unrelated persons is respected. As a result, the sole issue for this Court's determination is whether the City of Athens, Georgia zoning ordinance discriminates against handicapped persons in violation of the Fair Housing Act by limiting the number of unrelated persons who may live in a dwelling unit to four.

In pertinent part, 42 U.S.C. 3604(f) provides that it shall be unlawful to:

(1) "Discriminate in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap ...";

(2) "To discriminate against any person in terms, conditions or privileges of the sale or rental of a dwelling or, in the provision of services or facilities in connection with such dwelling, because of a handicap ...";

(3B) Refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling...."

The parties have stipulated that the proposed residents of the halfway house would be handicapped as that term is used in the Act. Before considering whether a Fair Housing Act violation has occurred, the Court must first consider whether the exemption contained in 42 U.S.C. 3607(b)(1) applies to the present case.

B. Fair Housing Act Exemption

42 U.S.C. § 3607(b)(1) provides: "Nothing in this subchapter limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

The Plaintiffs contend that the Athens ordinance is unreasonable in that related persons are treated differently than unrelated persons. In support of the contention, the Plaintiffs look to the legislative history where an example limiting the number of occupants based on square footage is cited. However, this is only an example and is not intended as the only way in which

a local government may limit the number of persons who live in a dwelling unit. House Report No. 100-71, June 17, 1988, Cong.Record Vol. 134, page 31 (1988).

More important, a square footage limit or other limit which restricts the number of related persons would be unconstitutional. A square footage method would effectively force a nuclear family to move or give up a child in the event that a newborn child caused the limits to be exceeded. Such an intrusion would clearly violate the freedoms of personal choice in matters of marriage and family protected by the due process clause of the Fourteenth Amendment. Moore v. City of East Cleveland, 97 S.Ct.1932, 431 U.S. 494 (1977); Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir.,1989). Moreover, the testimony of Mr. Eplan sets out the impracticability of enforcing a square footage method.

Finally, this Court finds persuasive the legislative history behind the exemption: "Reasonable limitations by governments would be allowed to continue, as long as

they were applied to all occupants and do not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." House Report No. 100-71, June 17, 1988, Cong.Record Vol. 134, page 31 (1988). The ordinance clearly does not discriminate on its face on the basis of handicap status. To the contrary, it is completely neutral in that the occupancy limits simply are based on the fact that four unrelated persons are permitted to reside in a single-family dwelling without regard to whether they are handicapped.

This Court finds that it is reasonable for the city to limit occupancy by limiting unrelated persons. As to the limit of four, Mr. Eplan and Mr. Suddreth testified that four unrelated persons is the limit used in the vast majority of counties and municipalities. The City of Athens chose the number four by rounding up the 1960 census figure for average household size. This Court finds, as a matter of law, that the City of Athens, Georgia has set reasonable restrictions on the maximum number

of occupants and is therefore exempt under 42 U.S.C. 3607(b)(1) from the instant Fair Housing Act claim.

C. There Was No Fair Housing Act Violation

Even if the exemption did not apply, there has been no Fair Housing Act violation in this instance.

The parties have agreed that the ordinance does not discriminate on its face. With this in mind, the Plaintiffs may prove a violation of the Fair Housing Act either by showing intentional discrimination against the protected class or by proving a disparate impact on the protected class. Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II), 558 F.2d 1283 (7th Cir.1977).

1. Intent

The Plaintiffs' contentions are grounded on the city's adoption of the definition of family. There was no evidence presented to indicate that the ordinance was adopted with a discriminatory intent. The Plaintiffs further contend that the city's failure to amend its

ordinance after the Plaintiffs sent letters to the city provides a basis for a Fair Housing Act violation. They further contend that statements made by two council members evidence a discriminatory intent.

The Court disagrees. When City of Athens, Georgia Councilperson Reynolds was called to testify, she agreed that she made a statement in opposition to amendments to the ordinance regarding personal care homes some eight months after the rezoning request and four months after the letters were sent to the city. Notwithstanding the fact that the statements were made months after the letters were sent and years after the adoption of the ordinance, the statements were made on a subject unrelated to the Plaintiffs' claims. They had to do with personal care homes which require state licensing.

Councilperson Moore testified that she attended a neighborhood public meeting prior to the decision on the rezoning request. The fact that a councilperson

organized or attended a neighborhood meeting in opposition to the rezoning reveals no evidence of an intent to discriminate against the Plaintiffs. This is especially so when Reverend Lindsay was scheduled to attend but cancelled at the last minute. Further, Councilperson Moore stated that her decision to deny the rezoning request was largely based on protecting Ruth Street from a multi- family housing zoning classification. The fact that Councilperson Moore may have based her decision on the opposition of the neighbors again reveals nothing as to an intent to discriminate.

Even assuming that the Plaintiffs had proved intent on the part of these two councilpersons, and even assuming that the rezoning was a part of the Plaintiffs' claims, the decision to deny the rezoning was by a unanimous ten to zero vote. There was no evidence presented with respect to the remaining councilpersons.

The fact is that the Plaintiffs' claims are based on the original ordinance adopted in 1985 for which no

evidence of intent was presented. To the extent that the present acts of the city are under attack based on a failure to change the ordinance, this Court finds that the evidence presented by the Plaintiffs did not demonstrate an intent to discriminate.

2. Disparate Impact

Even if an intent to discriminate is not proved, the Plaintiffs may prove a Fair Housing Act violation by proving that the ordinance had the effect of discriminating, commonly referred to as disparate impact, on a protected class. Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II), 558 F.2d 1283 (7th Cir.1977). If disparate impact is proven, the Court will then consider four factors in considering whether a violation has occurred: (1) How strong is the discriminatory effect; (2) Is there some evidence of discriminatory intent; (3) The Defendant's interest in taking the action complained of; and (4) Whether the Plaintiffs seek to compel the Defendant to

affirmatively provide housing for the protected class or merely restrain the Defendant from interfering with individual property owners. Id.

This Court finds that the Plaintiffs failed in their burden of proving disparate impact. The Plaintiffs attempted to show an impact through the testimony of The Reverend Lindsay, Director of The Potter's House. The testimony demonstrated only, however, that The Potter's House could not get approval for a project designed exactly the way it was proposed to the City of Athens. The rehabilitation program for recovering alcoholics and drug addicts was for not fewer than twelve persons with a charge to each resident of $75.00 per week.

There was no evidence to demonstrate how many residents were required in order to make the halfway house economically feasible; there was no evidence to demonstrate what amount of money could feasibly be charged to a resident; and there was no evidence to

demonstrate how much money was required to make the halfway house self-sufficient. In fact, The Reverend Lindsay admitted that his intention was to provide the residents with a "bargain" because that was the nature of his personality. He further admitted that he never considered charging more than $75.00 per week.

The Reverend Lindsay initially tried in the direct examination to provide evidence of the fixed monthly costs associated with financing the Ruth Street property, but he later admitted that the information was for another piece of property in Athens. Finally, even though the pleadings state that The Potter's House wanted twelve persons for the halfway house, The Reverend Lindsay stated that he actually wanted fourteen. The Court finds that the evidence failed to demonstrate that the limits on occupancy had the effect of discriminating against The Potter's House or handicapped persons. Accordingly, the Court rules that there has been no Fair Housing Act violation committed by the Defendants.

Because disparate impact was not proved, the Court is not required to examine the other factors in the four part Arlington Heights test. However, the evidence presented by the city of their particular interest in zoning and planning warrants discussion. The Defendants have demonstrated a very important interest in limiting the number of unrelated persons in a single- family dwelling. Apart from the general considerations associated with planning and zoning, the City of Athens is unique in that there is a very high demand for rental housing with the presence of a major university. As is set out in the Findings of Fact, Mr. Eplan presented a compelling example of what happens in a university town when there are no occupancy limits.

"If the Defendant is a governmental body acting within the ambit of its legitimately derived authority, we will less readily find that its action violates the FHA." Arlington Heights, at 1293. The Supreme Court has held that zoning regulations protecting family residential

neighborhoods are a legitimate exercise of police power. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974). Moreover, Congress affirmed this commitment to protecting the family in amending the Fair Housing Act to include familial status as well as handicapped. "The Congress has consistently stressed the importance of the family in numerous social welfare programs intended to support children and their parents." House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, p. 19 (1988).

The interest of local government in placing limits on occupancy, and Athens' very unique interest, coupled with the constitutional limitation on restricting related persons (see infra. discussion of the constitutional claims), leaves little doubt that there is quite probably no better way to place limits on occupancy.

II. Constitutional Claims

The Court disagrees with the Plaintiffs contention that the ordinance, in distinguishing between related and unrelated persons, violates the Plaintiffs' equal protection and due process rights.

It is well established that protecting the family character of neighborhoods is a legitimate exercise of police power. Moore v. City of East Cleveland, 97 S.Ct.1932, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974). Note that in Belle Terre, supra., the Court held a limit of two persons. The City of Athens, by virtue of the presence of a major university, has an even greater need to preserve neighborhoods through the use of occupancy limits.

Clearly, however, there are limits as to what the city can do in the exercise of its power.

> Zoning restrictions cannot be applied to hinder those in a familial relationship from living together. In Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. (1932), 52 L.Ed.2d 531 (1977), the Court

> held that the sanctity of the family was not limited to the nuclear family and that a zoning ordinance which precluded defining a family to encompass a child living with his grandmother was arbitrary. It distinguished the Belle Terre ordinance on the ground that it affected only unrelated individuals. Id., at 498, 97 S.Ct. at 1935.

Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir.,1989).

> It follows that the City of Butler, no matter how valid its density concerns, could not constitutionally limit the number of related persons living together. If the absence of an occupancy limitation on the members of a family who can live together is bootstrapped into the argument that therefore there can be no occupancy limitations for unrelated persons living together, there could never be such an occupancy limitation and Belle Terre would be meaningless.

Id.

The Court's reasoning in Doe, supra., is important to the present case because, like the present case, the issue was whether restrictions on unrelated persons was constitutional. In light of the well established rule that the occupancy limit on related persons cannot be restricted

constitutionally, Athens has no choice but to differentiate between related and unrelated persons.

As applied in Georgia, Macon Association for Retarded Citizens v. Macon-Bibb County Planning & Zoning Commission, 252 Ga. 484, 314 S.E.2d 218 (1984), is nearly identical. In Macon, at 220, an association sought approval for a home for five mentally retarded persons in the City of Macon, Georgia. The request was denied because Macon's definition of family limited to four the number of unrelated persons permitted to reside in a dwelling unit. Id. The Court, in upholding the constitutionality of the family definition held: "In our opinion, there is nothing on the face of this definition of family which discriminates against mentally retarded individuals, and in our view, this definition of family withstands equal protection scrutiny under Village of Belle Terre v. Boraas ..." Id. Accordingly, this Court finds that the zoning ordinance in Athens violates neither the Plaintiffs' due process nor equal protection rights

guaranteed under the Constitutions of the United States and the State of Georgia.

Conclusion

It is the conclusion of this Court that there was no Fair Housing Act violation in the present case. Further, this Court concludes that the Zoning Ordinance for the City of Athens, Georgia does not violate the Plaintiffs' due process or equal protection rights guaranteed under the Constitutions of the United States or the State of Georgia. Accordingly, judgment is entered in favor of the Defendants.

SO ORDERED this 23 day of January, 1991.

/S/
DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA, ATHENS DIVISION

Supreme Court, U.S.
FILED
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(2)

NO. 92-307

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1992

John D. Elliott and C. Leonard Davis,

Petitioners,

v.

The City of Athens, Georgia, and the Mayor and Council of the City of Athens, Georgia; Dwain P. Chambers; Miriam Moore; Harry Sims; Cardee Kilpatrick; Kathy Hoard; Linny Bailey; Mac Coile; Carolyn Reynolds; Gwen O'Looney; and Calvin Bridges,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	PAGE NO.
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
RESPONSE TO REASONS FOR GRANTING WRIT	14
I. THE COURT PROPERLY RULED THAT THE CITY IS EXEMPT FROM THE FAIR HOUSING ACT IN THIS CASE BECAUSE THE ZONING ORDINANCE PROVISIONS AT ISSUE ARE REASONABLE OCCUPANCY LIMITATIONS PERMITTED BY 42 U.S.C. § 3607(b)(1)	14
A. The Athens Ordinance is a reasonable maximum occupancy limitation	14
B. The ordinance is reasonable as applied	23
II. CERTIORARI IS NOT REQUIRED BECAUSE THE COURT DID NOT ERR AND BALANCING IS THE MOST APPROPRIATE METHOD TO DETERMINE THE RIGHTS OF THE PARTIES	28
CONCLUSION	31

TABLE OF AUTHORITIES

	PAGE NO.
U.S. Supreme Court cases:	
Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985)	24
Cleveland Board of Education v. Lafleur, 414 U.S. 632, 94 S. Ct. 791 (1974)	19
Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977) ...	18, 22
Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974)	21, 22
Federal Appeals Court cases:	
Doe v. City of Butler, P.A., 892 F.2d 315 (3rd Cir. 1989)	20, 21, 22, 23
Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992)	23, 24, 25, 27, 30

Federal Statutes:

42 U.S.C. § 3601	1
42 U.S.C. § 3604	27
42 U.S.C. § 3604(f)	14
42 U.S.C. § 3604(f)(3)(B)	15, 25, 26
42 U.S.C. § 3607	14, 15, 23, 27
42 U.S.C. § 3607(b)(1)	2, 14, 15

Legislative History:

House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, (1988)

STATEMENT OF THE CASE

This is a Fair Housing Act case involving handicapped persons. The Act is codified at 42 U.S.C. § 3601 et. seq. The case centers solely on the zoning ordinance provision of the City of Athens, Georgia which limits the number of unrelated persons who may reside in any single-family dwelling, regardless of handicap. The limitation in the ordinance is a neutral restriction on the density of a use and impacts every citizen of the City of Athens, Georgia equally.

Contrary to the Petitioners' assertions in the second paragraph of their Statement of the Case, the issue is not whether the Fair Housing Act will be frustrated. Instead the case before the Court is an effort by the Petitioners to stretch the Act beyond its limits. The Petitioners would like to have a use consisting of fourteen persons on a lot in a single-family residential zoning district in

the city. At issue is whether the Petitioners are entitled to a home consisting of fourteen recovering alcoholics and drug addicts (including two live-in counselors) simply because that is the number that the Petitioners want. Rather than allow fourteen persons to occupy a lot where the average density is less than four, the city is entitled to exercise a reasonable occupancy limitation as authorized by 42 U.S.C. § 3607(b)(1).

Unlike most of the Fair Housing Act cases, the Petitioners are not handicapped, they are real estate investors. Unlike most Fair Housing Act cases, this does not involve a local ordinance or regulation which is specifically directed towards handicapped persons. For example, this case does not involve special use permits and it does not involve dispersion or distance requirements between group homes. A halfway house of the

type suggested by the Petitioners is free to operate on the property which is the subject of this litigation so long as the limits on occupancy are respected.

The Petitioners are the owners of two detached single-family homes located on a single lot at 490-490½ Ruth Street in the City of Athens, Georgia. The Petitioners are not handicapped, but purchased the Ruth Street property in a foreclosure sale on the courthouse steps for the purpose of financial investment. They did not have a particular buyer in mind, and since Elliott is in the real estate business, the property was listed with the company for which he is an agent. The Reverend Jack Lindsay, director of The Potter's House, expressed an interest in purchasing the subject property from the Petitioners for use as a halfway house for recovering alcoholics and drug addicts.

The Potter's House and the Petitioners

entered into a contract whereby The Potter's House agreed to purchase the Ruth Street property, contingent upon the Petitioners obtaining the proper zoning. The Ruth Street property is located in a low density single-family residential zoning district (RS-10). The Zoning Ordinance for the City of Athens, Georgia provides that the only permitted residential use on a lot in an RS-10 district is one single-family detached dwelling. The maximum number of people who are permitted under the zoning ordinance to live in a single-family dwelling is limited by the definition of the term "family" as found in the zoning ordinance. That definition of family provides, as follows:

> One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a

> related family may have up to two (2) unrelated individuals living with them. The term "family" does not include any organization or institutional group.

The Assistant Planning Director for the City of Athens, Georgia, Kenneth Suddreth, testified that in accordance with the definition, persons are permitted to reside in a single-family dwelling regardless of the use, so long as no more than four unrelated persons reside in a dwelling.

The RS-10 district permits one single-family structure per lot, but because two structures were located on the Ruth Street property prior to the adoption of the ordinance, a grandfather clause allows the two single-family dwellings to remain. As a result, four per dwelling or up to eight unrelated persons are permitted to reside on the Ruth Street property. The Reverend Lindsay is free to use the property as a halfway house, as long as the limits of no

more than four unrelated persons per household are respected.

This case is before the Court only because the Reverend Lindsay wanted fourteen residents, twelve of which were to reside in one of the homes. The planning department advised the Petitioners that the proposed use was not permitted on the Ruth Street property because of the excessive number of persons. The planning department further advised the Petitioners that the only permitted use was a "boarding house" because up to twenty persons were permitted to reside in such a dwelling. A boarding house is not permitted in an RS-10 zoning district and, as a result, the Petitioners applied to have the Ruth Street property rezoned to an RM-2 multi-family district where such a use is permitted.

The planning department staff recommended denial of the rezoning application for reasons that the Ruth Street property is located in a

single-family district and rezoning the property to multi-family would set a negative precedent for the neighborhood's future and it would constitute spot zoning. There would be a distinct change in the character of the use in allowing fourteen rather than four. The planning commission voted to recommend denial of the application and the city council voted unanimously to deny the application. The vote was ten to zero. All of the property along Ruth Street is zoned RS-10 and photographs taken by the planning department demonstrate that Ruth Street is distinctly residential.

At the trial of the case, the Respondents presented evidence of the basis of the zoning ordinance. The zoning ordinance is designed to minimize the negative impacts and conflicts associated with the differing uses in a community. For example, business and industrial uses are separated from residential uses. Low density residential uses such as

houses are separated from high density residential uses such as apartments.

Beyond these reasons the presence of a major university, the University of Georgia, has a major impact on the City of Athens, Georgia, and presents unique problems in terms of planning and zoning. Mr. Suddreth testified that the number of students attending the university greatly exceeds the available on-campus housing. The demand for housing the remainder of the students creates an excessive rental market. This, along with the limited financial means of students creates a desire to fit large numbers of people into the available units in order to share costs. Additionally, college students create their own unique noise and safety problems that are magnified by the large number of students.

The unique effect of college students on the residential character of a neighborhood

when occupancy limits are not respected in a university town was demonstrated by Mr. Leon Eplan. Mr. Eplan is a land use planner and is currently the Commissioner of Planning and Economic Development for the City of Atlanta, Georgia. He cited the Homewood neighborhood around Georgia Tech University as an example. Homewood began as a very prominent single-family neighborhood. As the university grew and the demand for student housing increased, it became profitable to rent homes in the neighborhood to students by increasing the density of use. Unfortunately, at the time this occurred, Atlanta had no zoning ordinance and student rentals occurred unchecked. Student rentals destroyed the single-family character of the neighborhood and made it unattractive for family living. By the time zoning was introduced to Atlanta, single-family zoning was no longer appropriate.

Both Mr. Eplan and Mr. Suddreth testified

that limiting the number of persons that may reside in a dwelling by limiting the number of unrelated persons is the method used by the vast majority of counties and municipalities. Similarly, the number four is the most common limitation. Athens chose the number four by rounding up the 1960 census figure for average household size. Since 1960 average household size has fallen to less than three, but the city has chosen not to reduce its limit.

Further, Mr. Eplan testified that in protecting a single-family neighborhood, limiting the number of unrelated persons is important because the larger percentage of unrelated persons residing together are adults. This is significant because adults have a greater negative impact on the environment. When the number of unrelated persons gets above four or five, the impact begins to destroy the single-family character. Permitting fourteen persons would cause a very

abrupt change that would not be consistent with the residential character of the neighborhood.

The Petitioners suggested alternatives for limiting the number of persons permitted to reside in a single-family dwelling, but Mr. Eplan testified that these are unworkable. The Petitioners suggest limiting the number of persons on a square footage basis or a limit per dwelling without regard to relationship of the individuals. Mr. Eplan testified that although a very few jurisdictions have adopted such methods, they are unworkable. Among other things, a family would be forced to move when a child was born that caused the limit to be exceeded. If the limit were set too high, in an effort to avoid this possibility, the ability to preserve residential character would be defeated. This would be especially harmful in a college town. Permitting fourteen persons, as the Petitioners suggest,

would clearly defeat the ability of the city to protect single-family neighborhoods. The same would be true if a group home use in the ordinance permitted fourteen residents in a single-family district.

The Petitioners did not prove that the halfway house could not operate in the single-family district and respect the occupancy limitations. The Reverend Lindsay presented testimony on behalf of the Petitioners with respect to The Potter's House. He testified that The Potter's House was to have a total of fourteen residents, twelve recovering alcoholics and drug addicts and two counselors. The Reverend Lindsay testified that he never considered any number other than fourteen. The Reverend Lindsay next testified that he would charge each of the residents $75.00 per week for all of their needs including food, shelter, and clothing. When asked how he arrived at this figure, the

Reverend Lindsay initially testified that this was the minimum required to meet the costs to make the home self-sufficient. However, later the Reverend Lindsay admitted that the figures he used in calculating costs were for a different piece of property. When asked about the specific costs, the Reverend Lindsay admitted that he had left the figures at home. In fact, the Reverend Lindsay made no calculations. When asked why he chose the figure of $75.00 per week, the Reverend Lindsay admitted that he wanted to give the residents a "bargain" because it was his nature. The Reverend Lindsay testified that the customary amount was upwards of $125.00 to $150.00, nearly twice the amount he planned to charge.

RESPONSE TO REASONS FOR GRANTING WRIT

I. **THE COURT PROPERLY RULED THAT THE CITY IS EXEMPT FROM THE FAIR HOUSING ACT IN THIS CASE BECAUSE THE ZONING ORDINANCE PROVISIONS AT ISSUE ARE REASONABLE OCCUPANCY LIMITATIONS PERMITTED BY 42 U.S.C. § 3607(b)(1).**

A. The Athens Ordinance is a reasonable maximum occupancy limitation.

The issue in this case is whether the city's ordinance which limits the number of unrelated persons to four in any family dwelling constitutes a violation of the Fair Housing Act. The Petitioners wish to have a total of fourteen residents, twelve of which would be in one house. The Courts below have ruled the ordinance section at issue is a reasonable occupancy limitation, thus exempting it from further consideration under the Fair Housing Act in this particular case. 42 U.S.C. § 3607.

In pertinent part, the Fair Housing Act provides in 42 U.S.C. § 3604(f) that it shall

be unlawful to:

(1) "Discriminate in the sale or rental, or otherwise make available or deny, a dwelling to any buyer or renter because of a handicap...";

(2) "To discriminate against any person in terms of conditions or privileges of the sale or rental of a dwelling or, in the provision of services or facilities in connection with such dwelling, because of a handicap..."; and

(3) B. Refuse "to make reasonable accommodations in rules, policies, practices, or ser-vices, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling... ."

However, 42 U.S.C. § 3607 "Exemption" identifies certain groups and actions which are exempt from the requirements of the Fair Housing Act. 42 U.S.C. § 3607(b)(1) provides: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

At the outset it is important to address the legislative history raised by the Petitioners in page 15 of their brief. It is their position that the intent of the exemption was that it apply only when the occupancy limitation applies to all persons without any distinction. In this case the Petitioners contend that the Athens limitation is not exempt because unrelated persons are treated differently than related persons. Such an interpretation misconstrues the intent of the exemption.

Application of the Fair Housing Act towards government is aimed at specific requirements that single out handicapped persons from those who are not handicapped. The legislative history cites an example of regulating congregate care facilities by the number of unrelated persons. The history concludes that this type of restriction has the effect of discriminating because the

requirements do not apply to other groups of unrelated persons. House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, p. 24. In no uncertain terms the history spells out the intent which is to prohibit special regulations which are directed at the handicap use:

> The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

Id. (Emphasis Supplied). The Athens ordinance is not a special requirement. It is a limitation on household size that applies to everyone, whether handicapped or not.

The Petitioners insist that the ordinance must place a maximum limitation on the occupancy of both related and unrelated persons. The evidence at trial demonstrated, however, that limiting the number of related

persons was unworkable and unenforceable. Mr. Eplan testified that such a restriction would cause a family to be in violation of the law when a child was born that exceeded the limitation. He also testified that it was unworkable to provide occupancy limitations based on square footage because it would be unenforceable. More details of Mr. Eplan's testimony are provided in the Respondents' Statement of the Case.

Apart from the evidence on what is reasonable, the case law dictates that a distinction be made between related and unrelated persons, and this distinction is specifically held to be reasonable. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977), and its progeny, establish that limitations on the number of related persons in a dwelling is unconstitutional, and limiting occupancy by limiting unrelated persons is reasonable. In Moore, U.S. at

495-497, East Cleveland's ordinance limited the occupancy of a dwelling to members of a single-family and generally defined family to be a nuclear family. Because the Plaintiff's family fit none of the categories, she was issued a citation and then was convicted of a criminal offense. Id. Specifically, the governing authority issued a citation when Ms. Moore's grandson came to live with her after the death of the grandson's mother. Id. In holding that the ordinance was unconstitutional, the Court reaffirmed its recognition that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id., U.S. 499 (quoting Cleveland Board of Education v. Lafleur, 414 U.S. 632, 639-40, 94 S. Ct. 791 (1974)).

The Court explained in great detail the reason for protecting family status and

clearly stated its intent to safeguard the family:

> Our decisions establish that the constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id., U.S. at 503-504. See also, Id. at 504-505.

Not only have the courts struck down limits on related persons, but they have specifically held that limitations of related persons are "reasonable". Doe v. City of Butler, P.A., 892 F.2d 315 (3rd Cir. 1989). In Doe at 319 (fn. 3), 321, the Court had under its consideration an ordinance which limited the number of unrelated persons in a transitional or any other dwelling to six residents while placing no limit on the number of related persons. At issue was the city's refusal to allow a use permit for a home for

battered women which requested more than six residents. Id., at 316-317.

In rejecting the due process claim, the Court recognized density control as an appropriate goal in planning and zoning. Id., at 320. The Court then rejected the Appelant's argument that density may be controlled through other means such as occupancy limits based on lot size and lot ratio requirements. Id. The Court concluded based on Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974), that "restriction on occupancy by unrelated residents is sufficient precedent for the reasonableness of restricting density via an occupancy limit contained in a zoning regulation." Doe, at 321 (emphasis supplied).

The Appellants in Doe next argued that the limitation was not a maximum occupancy limit related to density control because there was no limit on the number of related persons

that could live together. The Court rejected that argument and in reliance on Moore, supra, held that "zoning restrictions cannot be applied to hinder those in a familial relationship from living together." Id. The Court in Doe, at 321 concluded:

> It follows that the City of Butler, no matter how valid its density concerns, could not constitutionally limit the number of related persons living together. If the absence of an occupancy limitation on the members of a family who can live together is boot-strapped into the argument that therefore there can be no occupancy limitation for unrelated persons living together, there could never be such an occupancy limitation and Belle Terre would be meaningless.

As with the ordinances in Doe and Belle Terre, supra, the ordinance in the present case limits the number of unrelated persons who may reside in a dwelling. It is well established that such a limitation is a reasonable limitation on the maximum number of persons that are permitted to reside in a dwelling. Since the limitation in Athens'

ordinance is exactly the type considered in Doe, it is a reasonable occupancy limitation and is exempt from further Fair Housing Act consideration under 42 U.S.C. §3607.

B. The ordinance is reasonable as applied.

The Petitioners next contend that the Court of Appeals erred in balancing the interest of the city against those who might occupy the halfway house to determine that the occupancy limitation is reasonable as applied in this case. It is interesting to note that the Petitioners do not challenge the conclusion that the balance falls in favor of the city.

The Court of Appeals determined that balancing interests was appropriate by comparison to the Rehabilitation Act of 1973, 87th Stat. 394, and the case law interpreting the Rehabilitation Act. Elliott v. City of Athens, 960 F.2d 975, 981 (11th Cir. 1992).

Specifically, the Court of Appeals relied on Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985), in which the Supreme Court used the balancing of interests as the appropriate method examining violations under the Rehabilitation Act. Elliott v. City of Athens, 960 F.2d 975, 981 (fn.7) (11th Cir. 1992).

Reliance on the Rehabilitation Act is grounded in the frequent comparisons to the Rehabilitation Act cited in the Fair Housing Amendments Act legislative history. See example, House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, p.18. Moreover, even the legislative history cited by the Petitioners under the exemption contemplates the disparate impact analysis when it states that reasonable limitations will be allowed in part so long as they "did not operate to discriminate". Id. at page 31.

The basis for the argument on behalf of

the Petitioners is the dissenting opinion of Judge Kravitch. Elliott, at 985-988. The argument is advanced that a balancing test is inappropriate because a Fair Housing Act violation includes a failure to make reasonable accommodations under some circumstances. Id. at 985-986. In effect the dissent argues that the exemption does not apply when there has been a violation of the Fair Housing Act. A violation under 42 U.S.C. § 3604(f)(3)(B) includes: "a refusal to make reasonable accommodations in rules, policies, practices or services when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling." Based on the language in the first part of Subsection B, the dissent concludes that discrimination is simply a refusal to make accommodations, without any balancing. Id. at 985-988. In this case the dissent and the Petitioners contend that there is a

violation because the city refused to permit the proposed use of fourteen persons on a lot in the single-family district.

While the analysis of the Petitioners and the dissent rely on the "reasonable accommodation" language of 42 U.S.C. § 3604(f)(3)(B), they ignore the language of the Subsection which requires reasonable accommodation only when an "equal opportunity" has been denied. When the entirety of Subsection (B) is considered, it is apparent that the first step in finding a violation is a finding that an equal housing opportunity has been denied and, of course, this would require the same disparate impact analysis used by the majority. Moreover, regardless of whether the issue is reasonable accommodation or a reasonable occupancy limit, the term "reasonable" itself dictates that there is a balancing of the interests.

The point which is lost by the

Petitioners, however, in using § 3604 is that this is the section which defines the unlawful conduct. It is not the section which defines the exemption. 42 U.S.C. §3607 contains the exemptions and the unlawful conduct of §3604 is not considered if the exemptions apply. As a result, consideration of reasonable accommodation under § 3604 in this discussion is inappropriate since the only issue before the Court is whether the ordinance at issue is a reasonable maximum limitation on occupancy which provides for an exemption to the conduct which may otherwise be sanctioned by the Fair Housing Act. Following this same rationale, the majority took issue with the dissenting opinion and reasoned that under the dissent's construction, the exemption would be nullified because it would only apply when there was no Fair Housing Act violation in the first place. Elliott, at n. 12, 984.

For these reasons the did Court did not

err in concluding that city's occupancy limitation was reasonable occupancy limitation thereby exempting the city from further Fair Housing Act consideration.

II. CERTIORARI IS NOT REQUIRED BECAUSE THE COURT DID NOT ERR AND A BALANCING OF INTERESTS IS THE MOST APPROPRIATE METHOD TO DETERMINE THE RIGHTS OF THE PARTIES.

Contrary to the Petitioners' complaint about preserving the rights of the handicapped, the issue for the Petitioners is whether they can sell their property to someone who wants a use that is three and one half times the permitted density in terms of occupancy. The Petitioners want to place fourteen persons on a lot that would ordinarily allow four. They contend that they should be allowed to ignore density requirements when the issue is handicap, even if it means destroying the single-family character of the zoning district. They contend that the Court should not balance the

interests of the city, but should consider only the fact that the Petitioners have been denied their precise use, even though any other group would be denied the same use when the proposed density is so high.

The fact is that the Petitioners are free to operate their use as long as limitations on occupancy are respected in the same manner that they are imposed on everyone. If the Petitioners desire a use which is more dense, then they must operate in the districts which are designed for the increased density. The Petitioners did not ever prove that they could not operate the halfway house and respect the occupancy limits.

The Petitioners simply want to avoid balancing the rights of the city because their evidence was not sufficient. On the side of the city, the Petitioners concede the interest in preserving the single-family character of neighborhoods. In the present case, they

concede the particular problems of the City of Athens in preserving neighborhoods from overcrowding by students. Respondents' Statement of the Case identifies the testimony of how city carefully chose the particular limitations on occupancy.

On the side, the Court of Appeals concluded that the Petitioners' evidence was weak. Elliott, at 982. For the reasons stated throughout, they proved only that they could not have what they wanted. Quite conspicuously, the Petitioners do not challenge the results of the majority's balancing test in favor of the Respondents.

The only way to meet the intent of the Fair Housing Act and preserve the recognized interest of government in zoning is to strike a balance between the two in precisely the manner done by the lower Court. Striking the balance will not permit government to frustrate the Fair Housing Act, but will

require a case by case evaluation of the evidence from each side and will insure that the intent is preserved.

CONCLUSION

WHEREFORE for the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JENKINS & EELLS

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **BRIEF FOR RESPONDENTS** upon all parties to this matter by depositing a true copy of same in the United States Mail, proper postage prepaid, addressed to counsel of record as follows:

Bradley S. Wolff, Esq.
Scott and Quarterman
Post Office Box 1232
Athens, Georgia 30603

This 24 day of September, 1992.

Kirk R. Fjelstul

Supreme Court, U.S.
FILED
OCT 2 1992
OFFICE

NO. 92-307

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1992

JOHN D. ELLIOTT and C. LEONARD DAVIS,

Petitioners,

v.

THE CITY OF ATHENS, GEORGIA,
and the MAYOR AND COUNCIL
OF THE CITY OF ATHENS, GEORGIA,
DWAIN P. CHAMBERS, MIRIAM MOORE, HARRY SIMS,
CARDEE KILPATRICK, KATHY HOARD, LINNY BAILEY,
MAC COILE, CAROLYN REYNOLDS, GWEN O'LOONEY
and CALVIN BRIDGES,

Respondents.

**ON PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITIONERS' SUPPLEMENTAL BRIEF

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In support of their Petition for Writ of Certiorari, Petitioners call to the Court's attention the recently decided case of Parish of Jefferson v. Allied Health Care, Inc., --- F.Supp. ---, 1992 U.S. Dist. Lexis 9124 (E.D. La. June 10, 1992)[1]. Although this case was decided by a district court and not a court of appeals, the facts and issues involved in the case are so similar to the case at bar that the decisions cannot be reconciled and a division among the circuits is likely to result.

In Parish of Jefferson, the district court held that a local zoning ordinance which restricts occupancy of a home to not more than four unrelated persons discriminates against handicapped persons and is not exempt, under 42 U.S.C. § 3607(b)(1), from the provisions of the Fair Housing Act which protect the handicapped. Id.

Allied Health Care, Inc. purchased two duplex residences in Jefferson Parish, Louisiana for the purpose of operating community homes for mentally handicapped

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[1] Three separate cases, Nos. 91-1199, 91-1200 and 91-3959 were consolidated by the district court as noted at fn. 1.

individuals. The duplexes are located in an area of the Parish zoned R-2, a zoning classification which permits a maximum of four unrelated persons to reside in a dwelling unit. As duplexes, eight persons would be allowed to reside on each property. Allied modified the duplexes by opening internal passageways between the units, converting each property into a single dwelling. Allied intended to operate the group homes with six residents at each site.

Jefferson Parish filed suit against Allied, seeking to enjoin the operation of the group homes, contending that the operation of a community residence for more than four persons would violate the zoning ordinance as the modified homes were now single-family residential dwellings. The United States filed suit against Jefferson Parish, seeking various forms of relief including an order declaring the Parish's action in violation of the Fair Housing Act.

Allied and the United States contended that the Fair Housing Act required the Parish to grant a variance, allowing the operation of the group homes, with a total of six occupants in each, as a reasonable accommodation for the handicapped, pursuant to 42 U.S.C. §§ 3604(f)(3)(A)

and (B). Jefferson Parish, like the City of Athens in the case at bar, argued that its zoning ordinance does not discriminate on the basis of handicap, or deny the handicapped equal opportunity to housing, because its zoning ordinance is facially neutral and applies equally to all unrelated persons, regardless of handicap. The court found this argument unpersuasive and, relying upon the legislative history of the 1988 amendments to the Act, held that reasonable accommodation is required by a local government when the application of a zoning ordinance has "the effect of limiting the ability of handicapped individuals to live in residences of their choice in the community." Parish of Jefferson v. Allied Health Care, Inc., 1992 U.S. Dist. Lexis 9124 at 18-20. The court held that the Fair Housing Act requires Jefferson Parish to make reasonable accommodations for the needs of Allied's clients and that the requested variance was a reasonable accommodation. Id.

Next, the court turned to the Parish's argument that 42 U.S.C. § 3607 (b)(1) exempts the zoning ordinance from

the application of the anti-discrimination provisions of the Act. Here the court held:

> This exception cannot be considered in a vacuum. Its language was not intended to negate any obligation of reasonable accommodations necessary to allow mentally handicapped persons to reside in a group home setting.

Id. at 19. Applying the rationale advocated by Judge Kravitch in the instant case, the court held that Allied was entitled to a reasonable accommodation, that the accommodation requested was reasonable, and that the exemption contained in 42 U.S.C. § 3607 was not applicable. Accordingly, the court found the zoning ordinance to be in violation of the Fair Housing Act "in that it has the effect of discriminating against handicapped persons by unnecessarily restricting their ability to live in residences of their choosing in the community" and enjoined the Parish from interfering in the operation of the group homes. Id. at 21. As argued by Petitioners' throughout this case, the court's decision was a proper interpretation and application of the 1988 amendments to the Fair Housing Act.

CONCLUSION

Clearly, the decision in Parish of Jefferson v. Allied Health Care, Inc., --- F.Supp. ---, 1992 U.S. Dist. Lexis 9124 (E.D. La. June 10, 1992) cannot be reconciled with the decision of the 11th Circuit Court of Appeals in the instant case. Should Parish of Jefferson be affirmed on appeal, or be followed by any court of appeals, there will be a conflict among the circuits as to the proper interpretation and application of essential provisions of the Fair Housing Act. Accordingly, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari to review the decision of the 11th Circuit.

This 2nd day of October, 1992.

ARRINGTON & HOLLOWELL, P.C.

By: Bradley S. Wolff
Counsel for Petitioners

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